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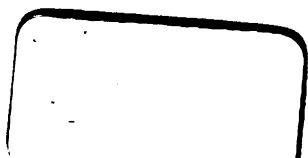
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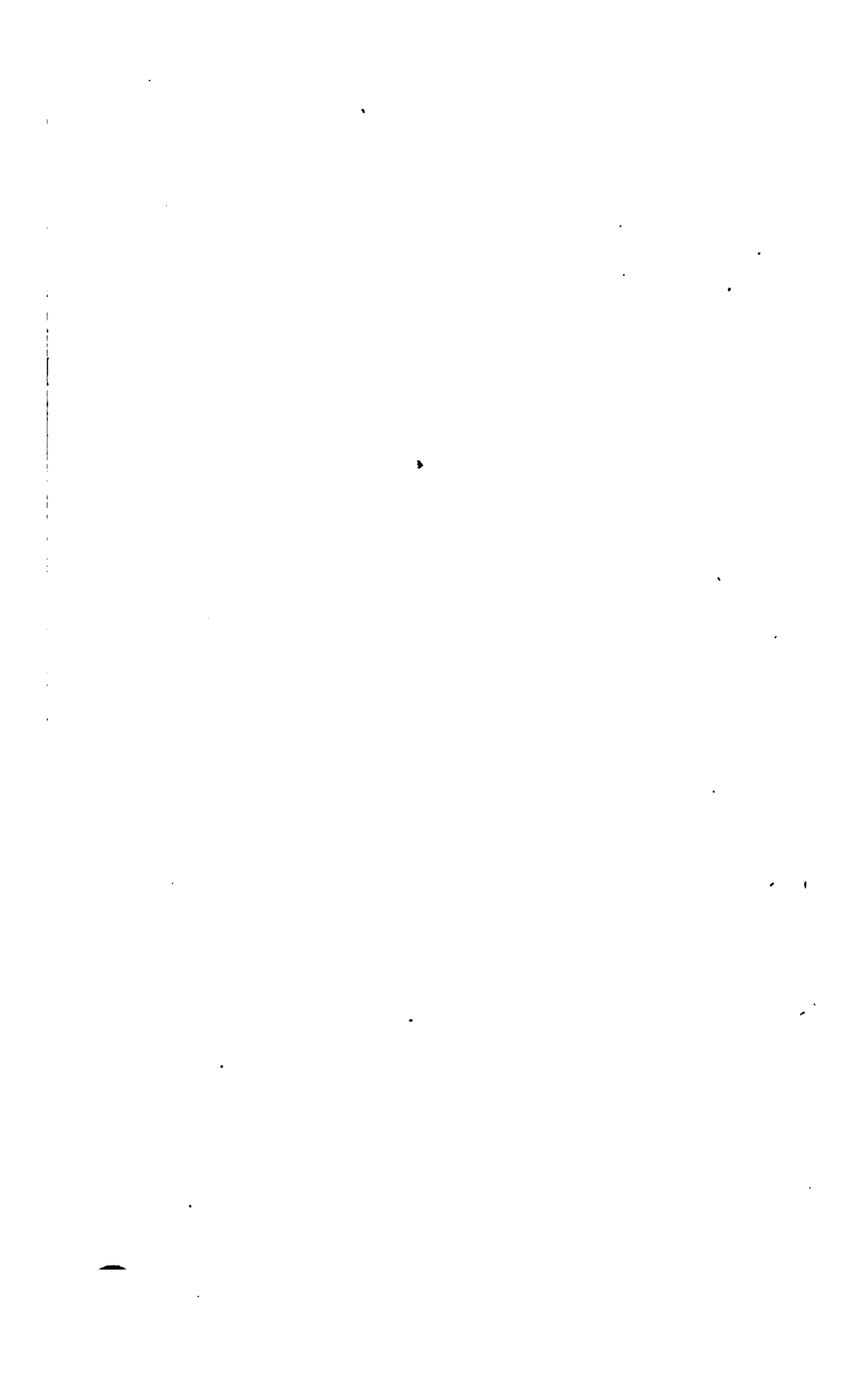
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AMERICAN NEGLIGENCE CASES

[CITED AM. NEG. CAS.]

A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED
STATES CIRCUIT COURT OF APPEALS, ALL THE UNITED
STATES CIRCUIT AND DISTRICT COURTS, AND THE
COURTS OF LAST RESORT OF ALL THE STATES
AND TERRITORIES, FROM THE EARLIEST
TIMES, WITH SELECTIONS FROM
THE INTERMEDIATE COURTS.

TOPICALLY ARRANGED
WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS

PREPARED AND EDITED
BY
WALTER J. EAGLE

VOL. XV

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PREFACE.

The subject of MASTER AND SERVANT, which is treated in Vols. 13 and 14 AMERICAN NEGLIGENCE CASES, is continued in this volume (Vol. 15), following the plan adopted in the previous volumes devoted to the topic.

Each State covered in this volume is, so far as the subject treated is concerned, complete. The cases reported, relating to the LIABILITY OF THE MASTER FOR INJURIES SUSTAINED BY EMPLOYEES, comprise all the decisions on the subject rendered in the courts of last resort in KANSAS (Supreme and Appellate), KENTUCKY, LOUISIANA, MAINE, MARYLAND and MASSACHUSETTS, together with a few leading cases in MICHIGAN and MINNESOTA. They are classified according to different branches of employment, all cases relating to a given topic being grouped and arranged in such a manner that the practitioner may avoid the necessity of constant reference to numerous places in the volume.

Numerous NOTES and ANNOTATIONS appear throughout the volume, a complete list of which is appended to the TABLE OF CASES REPORTED.

Especial attention is again called to the CLASSIFIED NOTES OF CASES which are given in this and the preceding volumes relating to MASTER AND SERVANT. These NOTES show the cause and nature of the injury, affirmance or reversal of judgment and the amount of the verdict in each case wherever the same is stated in the official report, together with a classification of the various branches of employment. This plan is also adopted in dealing with the numerous Massachusetts cases under the Employers' Liability Act, thus enabling the subject of MASTER

AND SERVANT, with its vast number of personal injury cases, to be kept within reasonable bounds in the matter of volumes to be devoted to the subject in the series of AMERICAN NEGLIGENCE CASES.

The great number of cases reported in this volume is indicated by the list in the TABLE OF CASES REPORTED.

An unusually large number of notes and abstracts of ENGLISH CASES appear in this volume.

Attention is called to the INDEX and the TABLE OF CASES CLASSIFIED which precedes it, a reference to each of which will enable the practitioner to find, without difficulty, any particular case or point in his search for authority on a given topic arising out of the particular branch of the law of MASTER AND SERVANT covered in this volume.

A SPECIAL NOTE on the SCOPE OF AUTHORITY OF GENERAL OFFICERS OF RAILROAD AND OTHER CORPORATIONS IN CONTRACTING FOR MEDICAL AND OTHER SERVICES TO INJURED EMPLOYEES AND THE LIABILITY THEREFOR, covers practically all the cases on the subject, and appears on pages 733 to 745 of this volume.

MASTER AND SERVANT CASES in the STATES and TERRITORIES not reported in this (Vol. 15) or the preceding volumes will appear in the next volume of AMERICAN NEGLIGENCE CASES.

WALTER J. EAGLE.

NEW YORK, *November*, 1904.

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Notes of cases in this volume will be found, in the majority of cases, to contain the facts and extracts from the opinions rendered in the decisions.

Reference should also be made to the TABLE OF CASES CITED, which follows this Table, for leading cases frequently cited in the reported cases in this volume.

For convenience of reference RAILROAD CASES are duplicated in this Table under R. R. Co. and RAILWAY Co., the title of each company also being given in its proper place, thus avoiding delay in search for particular cases frequently cited in decisions merely as RAILROAD Co., where the company is the appellant.]

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AMERICAN NEGLIGENCE CASES.

MASTER AND SERVANT.

MASTIN ET AL. V. LEVAGOOD.

Supreme Court, Kansas, July Term, 1891.

[Reported in 47 Kan. 36.]

DANGEROUS MACHINE.—1. When the owners of a horse-power threshing machine are guilty of gross negligence by leaving the bevel wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman, engaged in threshing with the machine in this condition, attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury (1).

1. Master and Servant Cases—Injuries to Employees.—The cases reported in this volume (15 AM. NEG. CAS.) relate to actions brought by employees to recover damages for injuries sustained by them in the course of their employment, and the liability of the employers therefor, and comprise the decisions from the earliest period to 1896, in the courts of last resort in KANSAS (Supreme and Appellate), KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, etc., with SPECIAL NOTES on various topics and notes of numerous cases in the English courts.

The cases reported in vol. 13 AM
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NEG. CAS., the first of the volumes devoted to the subject of MASTER AND SERVANT, are those decided in ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO (Supreme and Appellate Courts), CONNECTICUT, DAKOTA, DELAWARE (Supreme and Superior Courts), DISTRICT OF COLUMBIA and FLORIDA.

Vol. 14 AM. NEG. CAS., which continues the subject of MASTER AND SERVANT, contains the decisions in GEORGIA, HAWAII, IDAHO, ILLINOIS (Supreme and Appellate), INDIANA (Supreme and Appellate), INDIAN TERRITORY and IOWA.

The MASTER AND SERVANT cases not

2. SAME—LIABILITY.—In any voluntary act which may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor.
3. SAME—DUTY OF OWNERS—WARNING.—When danger is foreseen and pointed out to the owners of a threshing machine by the uncovered condition of the bevel wheel and cogs, a duty is imposed upon them to use every possible precaution to avoid injury to those engaged in operating the machine or working about it.
(*Official syllabus.*)

ERROR from Marion District Court. *Judgment affirmed.*

ACTION by Levagood against Mastin and another, to recover damages for the loss of his hand. At the November term, 1888, judgment was rendered for the plaintiff for \$1,331. The

covered in Vols. 13, 14 and 15 AM. NEG. CAS., will be reported in Vol. 16 AM. NEG. CAS.

Master and Servant Cases in the series of American Negligence Cases and American Negligence Reports.—Numerous cases arising out of the relations of Master and Servant and the Liability of the Master for Negligent Acts of the Servant causing Injuries to Third Persons are reported in the several published volumes of AMERICAN NEGLIGENCE CASES (vols. 1-12), the decisions being chiefly those in which Carriers of Persons are concerned. Vol. 8 AM. NEG. CAS., which is devoted to the cases bearing on the Liability of the Carrier for the Arrest, Assault and Ejection of Passengers is especially pertinent to the subject of Master and Servant on account of the many decisions on the question of what acts constitute the Servant's scope of employment and the liability of the Master therefor. There are cases in that volume decided in all the State and Federal courts on the question, reference to which will be found useful in connection with the treatment of the topic of Master and Servant in vols. 13, 14 and 15, and succeeding volumes

of AM. NEG. CAS. Reference should also be made to vols. 11 and 12 AM. NEG. CAS., in which several Master and Servant cases are reported under the subject of Collisions and Crossings covered in those volumes.

The cases reported in the AMERICAN NEGLIGENCE CASES series are arranged in alphabetical order of States and chronologically grouped from the earliest period to 1897.

For actions arising out of the relations of Master and Servant in Personal Injury cases, from 1897 to date, see vols. 1-15 AM. NEG. REP., and the current numbers of that series of Reports. The AMERICAN NEGLIGENCE REPORTS supplement the AMERICAN NEGLIGENCE CASES, and contain the cases on all branches of the Law of Negligence decided from the year 1897 to date, making a series of current cases on Negligence.

Special Notes on Master and Servant Topics.—See list of notes compiled in the series of AMERICAN NEGLIGENCE CASES and AMERICAN NEGLIGENCE REPORTS, appended as a note, in 13 AM. NEG. CAS. 2. Subsequent NOTES appear in the TABLE OF CASES REPORTED, in vols. 13, 14 and 15 AM. NEG. CAS.

defendants bring the case to this court. The opinion states the facts (1).

KELLER & DEAN, for plaintiffs in error.

GRATTAN & GRATTAN, for defendant in error.

Simpson, C.—The plaintiffs in error were the two-thirds owners of a horse-power threshing machine, the other third being owned by the father of one of them. When they went to a farmer's for the purpose of threshing his wheat with their machine, they furnished two feeders, one man to drive the horse-power and one man to measure the grain, it being the duty of the farmer for whom they were threshing to furnish pitchers, and the other necessary help. On the 16th day of September, 1886, the plaintiffs in error were engaged in threshing grain for one Pampella, with a Nichols & Shepherd horse-power machine. E. E. Mastin was driving, and Jack Mastin was feeding. Galbreth, whom the Mastins brought to the Pampella farm to feed, had traded work with one Rankin, who was in the employment of Pampella, and Rankin was feeding. Galbreth was hauling grain away from the machine. York, an employee of the Mastins, was measuring the grain. This defendant in error was pitching from the stack, and he was an employee of Pampella. During the work, and at about four o'clock p. m. of the 16th of September, 1886, Jack Mastin was feeding and was taken sick, and called to Rankin to take his place. Rankin did so, and recollecting that he had not recently oiled the cylinder, and knowing that Jack Mastin was sick, called to the defendant in error, who was pitching grain from the stack to the feeder, to oil the cylinder. The machine in use was a vibrator, of the Nichols & Shepherd pattern. The large iron wheel revolves rapidly, and when so revolving the exposed bevel wheel and cogs are imminently dangerous to human life and limb. The manufacturers of the machine make a strong iron shield to be placed over the wheel and cogs to render it safe to oil the cylinder or to do other work about it. In operation, the straw naturally lodges on, over and about the wheel and cogs, and conceals them, and makes it necessary, when any one is about to oil the cylinder, to

1. On motion for rehearing in the January Term, 1892, the court re-examined the grounds of the opinion handed down by the commission in the July Term, 1891 (the case at bar) and adhered to its original ruling. Motion for rehearing overruled. See *MASTIN ET AL. v. LEVAGOOD*, 47 Kan. 764.

remove the straw, and this is generally done with the hand. The shield had become so impaired that it was impossible to fasten it, or it would require great extra work to do so. It seems to be admitted that when the shield was not on, the wheel and cogs were imminently dangerous, and there is no question but that during the two days' threshing at Pampella's, and at the time the defendant in error lost his hand, the shield was not on, and the wheel and cogs were uncovered, except as hidden by the straw. To oil the cylinder, one has to reach up and over the shield to get the oil cup, and when the shield is on it can be oiled without danger. When the shield is off, and one knows it, to avoid imminent peril, the oil can is reached in an opposite direction from that used when the shield is on. The defendant in error, having inquired, was told where the oil can was, and went to the side on which the large iron bevel wheel is situate, at a point where the tumbling-rods connect with the horse-power, and the wheel revolves rapidly in cogs on the end of the cylinder, attempted to brush away the straw covering up the wheel, when his hand was caught in the cogs of the bevel wheel and was mashed. He brought this suit to recover damages for the loss of his hand, and was awarded \$1,331. The jury returned answers to special interrogatories as follows:

"1. Did not the plaintiff know, at and before the time he attempted to oil the cylinder, that the shield was off the bevel pinion? A. No.

"2. Did not the plaintiff know that it was dangerous, if it was dangerous, to attempt to oil the cylinder when the shield was off? A. No.

"3. Could not the plaintiff, in the exercise of ordinary prudence and care, have known that the shield was off? A. No.

"4. Would not the plaintiff have known that the shield was off if he had been ordinarily attentive to what he saw about the machine, and what he heard said by the defendants or others? A. Plaintiff did not know it was off.

"5. How much damage, if any, do you allow on account of the physical and mental suffering of the plaintiff? A. One hundred dollars.

"6. How much damage, if any, do you allow on account of the loss of plaintiff's hand? A. Nine hundred and ninety-seven dollars.

"7. How much damage, if any, do you allow on account of

plaintiff's expenditures for medicine and surgical services?
A. One hundred and thirty dollars.

"8. What sum of money, if any, do you allow as exemplary damages? A. None."

The admitted fact is that the uncovered bevel wheel was very dangerous. It is established by the evidence, and there is no controversy as to the fact, that the owners of the machine knew that it was uncovered, that they had been warned of the dangerous consequences and that they were guilty of gross negligence for using it in that condition. It is equally clear from the evidence, and the jury so find, that the defendant in error did not know that the bevel wheel was uncovered and that the shield was not on. Now, on this state of facts, separate and apart from any contractual relations, or any question as to the attitude of these parties as master and servant, the operation of this machine in its dangerous condition imposed a duty on the owners and operators thereof toward all who were engaged in the work, or who by any possibility, in the discharge of duty or in the performance of labor, might be brought in contact with it, that was certainly disregarded. For it may be stated, as a general rule, that where any voluntary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor, and this is true regardless of the motive or the degree of care with which the act is performed. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Cahill v. Eastman*, 18 Minn. 324; *Phinizy v. Augusta*, 47 Ga. 260; *St. Peter v. Denison*, 58 N. Y. 416; *Wilson v. New Bedford*, 108 Mass. 261; *Scott v. Bay*, 3 Md. 431; *Cooper v. Randall*, 53 Ill. 24; *G. B. & L. Ry. Co. v. Eagles*, 9 Colo. 544.

This rule applies to these plaintiffs in error in all its vigor. They operated the machine with the knowledge that the uncovered wheel was imminently dangerous to those working around it. They did this, too, after warnings that injurious consequences were liable to follow such use. The injuries resulting to the defendant in error were the natural and probable result of the use of this machine with the cogs and wheel in this uncovered condition. Its danger was foreseen and pointed out to the owners, and the duty was imposed upon them to adopt every possible precaution to avoid such a consequence. It seems clear to us, under the uncontradicted

evidence respecting the danger of operating the machine in such manner, and of the knowledge of the Mastins of the danger, and of the want of knowledge on the part of the defendant in error that the wheel was uncovered, that the right of recovery is clear and undoubted. It was an act of practical necessity that the machine should be oiled, as the business, both of the Mastins and Pampella, was to be expedited by it. The feeder, whose business or duty it was to oil when the other feeder was actively engaged at the mouth of the machine, was prostrate on the ground, sick and disabled. Anyone working about the machine, either for the Mastins or for Pampella, or for both, could be called upon to do this special work, but when called upon was entitled to have all the necessary protection to save him harmless while performing the special labor. We do not understand that there is any cast-iron rule that forbids a man who is engaged in pitching from the stack from attempting to oil the machine at the request of anyone whose duty it is to see that the machine is in proper working condition. The evidence in this particular case shows clearly that, if the shield had been on and the wheel covered, any person could have oiled the machine without any danger to life or limb; hence, the immediate, adequate and efficient cause of the injury is found in the fact that the wheel was negligently and knowingly left uncovered by these plaintiffs in error. Whatever intermediate acts may have been committed by Rankin or by other employees, the injury must rest for an efficient cause on this act of negligence of the plaintiffs in error. On general considerations growing out of the contract and the nature of the employment of the defendant in error, he was bound to do and perform, within reasonable limits, any ordinary acts expediting the business in which all parties there present were engaged that might be requested or demanded of him. He was designated by some one in authority to pitch from the stack, and he was directed by one who had authority to feed the machine, and to see that it was running properly, and to oil the machine. Both of these acts and his faithful performance of them were necessary ones, and expedited the business of both the Mastins and Pampella, and resulted to their benefit. We do not understand that the defendant in error was either a volunteer or an intermeddler, in the common acceptation of the term. He was there as an

employee of Pampella, to perform the labor assigned him, subject to the orders and directions of those who had charge of the various branches of the work. Pampella and the Mastins were associated together for a common purpose, and to do a particular part of the work. In the absence of some special controlling direction, the duty of the defendant in error was to do and perform all acts requested of him that were reasonable and he was capable of doing to expedite the associated effort. If the shield had covered the wheel, it would have been a very ordinary act to have oiled the machine when directed to do so by the person that all agree was charged with the duty of seeing that it was properly oiled; hence, we regard all this contention about the defendant in error being a volunteer or intermeddler as having no force or bearing. He was rightfully there. It was a part of his duty, under his contract of employment, to do and perform all ordinary acts of which he was capable, and which he was directed to do by those having charge of the work, that was necessarily included in its practical operation. Hence, it seems that there is a direct responsibility to him by reason of his rightful presence there and his lawful participation in the work on the part of the Mastins, independent of the inquiry as to whether he was an employee of the farmer or the owners of the machine.

It seems to be an established fact in this case that the operation of the machine with the uncovered wheel was imminently dangerous, and this is equivalent to saying that the owners of the machine were guilty of gross negligence in its operation. The great bodily harm of some one working about the machine without the knowledge that the wheel was uncovered was the natural and almost inevitable consequence of such gross negligence. The uncovered condition of the wheel imposed upon its owners the exercise of the highest degree of caution. This increase of duty arose out of the nature of the business and the danger to others incident to the operation of the machine. The duty of exercising great caution by the owners of the machine did not arise out of the contract with Pampella to do his threshing, but grew out of the wrong being done by the use of an uncovered wheel, known by them to be imminently dangerous. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Ad. & E.,

N. S. 29; *Illidge v. Goodwin*, 5 Car. & P. 190 (1). The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for damages occasioned by the discharge. *Dixon v. Bell*, 5 Maule & S. 198 (2). The general rule is that damages for which a party is liable are those, and those only, which are the natural and necessary consequences of his acts. *Kellogg v. Chicago, etc., R'y Co.*, 26 Wis. 267; *Ryan v. N. Y. Cent. R. Co.*, 35 N. Y. 211. There is this marked distinction between an act of negligence imminently dangerous and one that is not so; the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case. *Colegrove v. Harlem R. Co.*, 6 Duer, 410, 9 Am. Neg. Cas. 618*n*; *Burk v. De Castro*, 11 Hun, 357. Where contractors entered into a contract to put a cornice on a mill, the mill owners to furnish the necessary scaffolding, and the scaffolding furnished, being defective, fell and killed an employee of the contractors, the mill owners were held liable because the injury was the natural consequence of their negli-

1. In *LYNCH v. NURDIN*, 1 Ad. & E. N. S., it was held that the rule of law, that a plaintiff who has contributed to an injury, occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and a child under seven years of age, during his absence climbed on the wheel, and other children urged forward the horse whereby he was thrown to the ground and the wheel fractured his leg: Held, that the jury was justified in finding a verdict for him, if of opinion there was negligence on the part of the servant. Held, also, that the coöperation of third parties in the injury was not a ground of defense, if the means of injury were negligently left where it was extremely probable that they would be set in motion.

In *ILLIDGE v. GOODWIN*, 5 Car. & P.

90, it was held, that where a horse and cart are left standing in the street unattended, the owner is responsible for any damage done, although the horse backed by a stranger striking him and injured the contents of a show window.

2. In *DIXON v. BELL*, 5 Maule & S. 198, the defendant sent a young girl to bring a loaded gun, after having instructed the man who had the gun to remove the priming. The girl brought the gun, and, thinking the priming had been removed, pointed the gun at plaintiff's son and pulled the trigger, discharging the contents of the gun and injuring the child. The defendant was held liable for negligence in leaving the gun without withdrawing the charge. "As by this want of care," says Lord Ellenborough, "the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible."

gence in constructing the scaffolds. *Coughtry v. Woolen Co.*, 56 N. Y. 128; *Cook v. Dock Co.*, 1 Hilt. 437; *Smith v. N. Y. Cent. R. Co.*, 19 N. Y. 130. So, in this case, the injury to the defendant in error was the natural consequence of the gross negligence of the owners of the threshing machine in leaving the wheel, with its imminently dangerous cogs, uncovered. That it was dangerous to human life and limb is unquestioned. That the Mastins knew it was is conclusively established. Despite the warnings of friends and neighbors, they persisted in its use in this dangerous condition. The natural result of this gross negligence was the serious injury of the defendant in error. Their answer to his demand for damages is, that he was not their servant. This answer, addressed to a man who was there in the regular course of employment to aid the accomplishment of the very work for which the owners of the machine had brought it to the farm of Pampella, is not a sufficient one. His duty was to do and perform such acts as assisted in the accomplishment of the common design. He did not direct the work, or had no right to, or was not appointed or selected for that purpose. His duties were assigned by those who had the controlling authority. His duty was obedience to the directions of those in authority, or to those who seemed, from the ordinary course of affairs, to be in authority. In obedience to a direction, a request or a command by one who was in actual control of the machinery, he attempted to oil the cylinder. The act attempted appears to have been one of absolute necessity, requiring immediate attention. It was an ordinary act, unattended with danger, that any reasonably prudent man could perform without injury, if it had not been for the gross negligence of the Mastins. Rankin, who made the request or gave the direction, was in sole charge of that part of the machinery about which the request was made and the direction given. He had been in charge for two days, with the knowledge, consent and approval of the owners of the machine. The writer of this opinion is clear in his conviction that, under these circumstances, Rankin was, for all legal purposes, the employee of the Mastins, in charge of this branch of the machinery, responsible for its successful operation, and fully authorized and empowered to do or cause to be done any act that was necessary for the accomplishment of that part of the work; that the defendant in error, by reason of his employment there, was subject to all reasonable orders and directions

necessary to the safe conduct of the business by those in authority; that as a matter of law he was an employee of the Mastins to the same extent and to the same degree as if he had been directly employed by them; that the relation of master and servant was established between them by reason of his employment by Pampella to engage in the associated work of the Mastins and Pampella; that the Mastins are liable to him for injuries caused by their gross negligence because of said employment; and that they are liable both because they used this dangerous machinery, with the knowledge of its danger, and because they failed to exercise reasonable care to protect an employee. The instructions of the court complained of, being in substantial conformity to these views, are not erroneous. We recommend that the judgment be affirmed.

BY THE COURT: It is so ordered. All the justices concurred.

EMPLOYEE INJURED BY PLANING MACHINE — ERRONEOUS DIRECTION OF VERDICT FOR DEFENDANT. — In **KELLEY v. BYUS**, 48 Kan. 120 (*January Term, 1892*), it appeared that the defendant owned and operated a planing mill in Kanas City, Kas. A. G. Millspaugh was his general superintendent, and J. F. Murray was his foreman for the work in the lower story of the planing mill. This lower story contained the planing machines, and also contained boring and mortising machines. Murray was at work at one of the boring machines, and the work of the one interfered with that of the other. Murray changed the work at the planing machine with the intention that there should be no further interference, but the change did not seem to be successful. While the plaintiff was guiding a board through the planing machine it struck the piece of timber which Murray had placed in the boring machine, and the board was so disarranged and displaced that one of the plaintiff's hands came in contact with the knives of the planing machine, and one of his fingers was cut off. On the trial in the Wyandotte District Court a verdict was directed for defendant and judgment was rendered thereon, from which plaintiff appealed. The Supreme Court *reversed* the judgment, the decision being stated in the official syllabus as follows:

"1. It is the duty of an employer in all cases to furnish his employees with a reasonably safe place at which to work, and with reasonably safe instruments or tools with which to work; and if he delegates these duties to another, such other becomes a vice-principal, for whose acts the principal is responsible.

"2. Where evidence is introduced on the trial which, if uncontradicted, would fairly prove all that is necessary for the plaintiff

to prove in order to make out his case, it is error for the trial court to instruct the jury to find for the defendant, although such evidence might be contradicted by other evidence. The court has nothing to do with any conflict in the evidence, but must submit the question as to which is true and which not to the jury."

THE CHEROKEE & PITTSBURG COAL & MINING COMPANY V. LIMB, AS ADMINISTRATOR, ETC.

Supreme Court, Kansas, July Term, 1891.

[Reported in 47 Kan. 469.]

PARENT AND CHILD—PECUNIARY LOSS—EVIDENCE—DAMAGES EXCESSIVE.—1. In an action brought for the benefit of the parents, as next of kin, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his lifetime; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, that a verdict awarding them \$1,500 as damages was excessive, and that under such evidence no more than nominal damages were recoverable.

2. **EVIDENCE—QUESTION FOR JURY.**—The evidence of negligence produced upon the trial examined, and held to be sufficient to warrant the court in submitting the case to the jury.

(*Official syllabus.*)

ERROR from Crawford District Court. Defendant appeals from judgment for plaintiff for \$1,500. *Judgment reversed.*

GEO. R. PECK, A. A. HURD, ROBERT DUNLAP and O. J. WOOD, for plaintiff in error.

J. F. McDONALD and W. R. BIDDLE, for defendant in error.

Johnston, J.—An explosion occurred on November 9, 1888, in Frontenac mine, No. 2, owned and operated by the Cherokee & Pittsburg Coal & Mining Company, whereby Daniel Limb, an employee of the company, was killed. He was an unmarried man, and left surviving him David Limb and Hannah Limb, his parents, next of kin and heirs at law. This action was brought by John Limb, as administrator of the estate of Daniel Limb, deceased, against the company, for the benefit of his parents, to recover damages for the pecuniary loss which they sustained by his death. It was alleged in the petition that the

death was caused by the negligence of the company in permitting the accumulation in the mine of dry, inflammable, combustible and explosive coal dust, which was communicated with by a blast of powder, causing a general explosion and the killing of Limb, who was at work in the mine, and who was then in the exercise of due care. The company denied the allegations of the petition, and contended that Limb's death was caused and materially contributed to by his own negligence. The trial resulted in a verdict in favor of the plaintiff below for \$1,500.

At the trial testimony was given tending to show that dry coal dust is a dangerous and explosive element in a mine, and that the danger may be allayed by properly sprinkling the mine with water. Some testimony was offered which tended to show that the persons in charge of the mine were aware of the dangerous character of the dust, and had sprinkled the mine to some extent, but had not done so sufficiently to prevent the explosion. The testimony of the company was in direct conflict with that produced by the plaintiff below, and tended to show that coal dust is not an explosive, and that the company and its managers were not negligent, as charged, and that the injury and accident were caused by the explosion of large quantities of gunpowder, carelessly ignited by Limb or some other of the miners.

The explosion which caused the death of Daniel Limb is the one referred to in the case of *The Cherokee & Pittsburg Coal & Mining Co. v. Richard Wilson, Administrator, etc.*, just decided [47 Kan. 460]. The testimony respecting the condition of the mine, the explosion, its origin and effects, and the knowledge of the company in regard to the dangerous character of coal dust, and what was necessary to overcome the danger, and also in regard to its want of care, is substantially the same as in the Wilson case (1). It was there held that the

1. In *THE CHEROKEE & PITTSBURG COAL & MINING CO. v. WILSON, ADM'R, ETC.*, 47 Kan. 460 (July Term, 1891), appeal from judgment for plaintiff in the Crawford District Court for \$5,000, judgment was *reversed*. The facts of the case were similar to those in the case at bar (the LIMB case), the death of plaintiff's intestate, James W. Wilson, an

employee of the defendant Coal Company, being caused by the same accident as in the Limb case, namely, an explosion in the defendant's coal mine. The points decided in the WILSON case are stated in the official syllabus as follows:

"In an action to recover for injuries resulting from a colliery explosion, the court will not take

testimony, though not full or satisfactory, was sufficient to take the case to the jury; and it must be so held in this case. Hence it cannot be held that the court erred in overruling the demurrer to the evidence of plaintiff below, or in failing to direct a verdict in favor of the company. Several errors are assigned on the admission and rejection of testimony. It is unnecessary to make special reference to these. We have examined them with care and find that the exceptions cannot be sustained.

It is contended that the verdict is excessive and unsupported by testimony showing that the next of kin sustained pecuniary loss by the death of Daniel Limb. In this respect there is a fatal lack of testimony. It is not shown that the parents of the deceased ever received any support from him, nor that they were dependent upon him to any extent for support or assistance. Neither is there any evidence in the record to show their pecuniary condition. There is testimony showing that he was a robust man, who, at the time of his death, was capable of earning eighty dollars per month, and one witness stated that he contributed to the support of his parents, but this statement turned out to be hearsay only, and no competent proof was offered that he ever contributed to their support, nor that the continuance of his life would have been of any pecuniary benefit to them. A witness stated that at one time the deceased bor-

judicial notice that dry, fine coal dust is a dangerous and explosive element in a coal mine.

"Where the negligence alleged was that the defendant company permitted the accumulation of inflammable, combustible and explosive coal dust in the mine, and failed to remove or sprinkle the same, proof that the mine was improperly laid out and constructed, or that proper doors or brattices were not supplied, is incompetent and inadmissible.

"There was an agreement between counsel for plaintiff and defendant that the testimony given by certain witnesses in a former case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement, and did not

procure the attendance of the witnesses, but at the trial the testimony of such witnesses, which is material and important, and which, if treated as a deposition taken in this case, would have been competent and admissible, was excluded from consideration upon the objection of the opposing party. The other party then applied for a continuance of the cause on account of the exclusion of the testimony and the inability to otherwise obtain the same, which application was denied. Held, error. Either the testimony should have been received or the continuance granted.

"The testimony in the case tending to sustain the charge of negligence as made examined and held to be sufficient to take the case to the jury."

rowed twenty dollars in order to make up a \$100 sum which he proposed to send to his father in Ohio, and that an order for that amount was inclosed in a letter addressed to his father, but the witness did not know whether the letter was ever mailed or sent to the father, or whether the father ever received the letter, and the defendant in error did not undertake to supply this necessary proof. This is an action for compensation only, and no damages can be recovered by the plaintiff below except for the pecuniary loss which the parents sustained by the death of the son. The burden was on the administrator to show that loss occurred. If there was no evidence that his life had been of actual benefit to the parents, or that any benefits might be reasonably expected by the continuance of his life, then no more than nominal damages could be recovered. *Atch., T. & S. F. R. R. Co. v. Weber*, 33 Kan. 543, 8 Am. Neg. Cas. 274ⁿ (1). There must have been evidence either of actual benefits or those in expectation before the jury can give substantial damages; and an attempt to assess such damages without proof would be to indulge in mere conjecture, which is not permissible. If the son had contributed anything in the past, there would be grounds for the expectation that he would have continued to contribute in the future; or if the son was a minor, the parents would have a legal right to the services of the son during his minority; but after majority, no such legal right exists, and the benefits thereafter would depend upon the capability of the son and his disposition to confer benefits on his parents. It is not shown that Daniel Limb was a minor, but it appears that he lived apart from his parents, was of full age, grown up, and capable of earning fair wages. The right of the parents to recover in such a case, and the nature of the proof required, was quite fully discussed by Mr. Justice Brewer in *Atch., Top. & S. F. R. Co. v. Brown*, 26

1. The case of *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. WEBER*, 33 Kan. 543, was an action for damages for the ejection of an intoxicated passenger from a train, and the case is cited in a Note of Kansas cases relating to Assault upon and Ejection of Passengers, compiled in 8 Am. Neg. Cas. 274. The case is cited in an Indiana case reported in 3 Am. Neg. Cas. 251, 254; also in a Louisiana case reported in 8 Am. Neg. Cas. 309, 312; also in a Mississippi case reported in 9 Am. Neg. Cas. 491, 495; also in a New Jersey case reported in 9 Am. Neg. Cas. 568, 570; also in an Ohio case reported in 10 Am. Neg. Cas. 16, 21, which said cases relate to the duty of carriers towards sick and intoxicated passengers.

Kan. 443 (1). It was there said: "It is not the loss of the decedent, but the loss of the survivors, which is to be estimated. That involves not merely the probable accumulations of the deceased, but the probability of the benefit of such accumulations inuring to the survivors. Where one who was the head of a family with minor children is killed, there is a reasonable certainty that his earnings, if he had survived, would inure directly to the benefit of the widow and children. When one dies without wife or child, with no one legally dependent upon him, and with only remote relatives as his next of kin, there is only a remote probability that his earnings, whatever they may be, would inure to such next of kin. * * * Where the deceased, leaving no wife nor child, leaves as his next of kin father or mother, and such father or mother is in good pecuniary condition, it is fair to say that his life would, if survived, have been of comparatively little value to them. In other words, his earnings would be used for his own pleasure or profit, and not go to the increase of their present good financial condition."

Whether the parents of the deceased are wealthy or dependent, or whether they were in the habit of conferring upon or receiving benefits from the deceased, does not appear. For all that is shown, they may be in good financial condition, without any necessity of help from their son, or any likelihood of pecuniary advantage by his continued existence. If they had received any portion of his earnings, or if there was any reasonable probability of pecuniary benefit from the continuance of their son's life in the future, it could easily have been shown. In the absence of proof showing that the parents suffered a pecuniary loss by the death of their son, the allowance made in the verdict is clearly excessive. For this error there must be a reversal of the judgment and a new trial.

Judgment accordingly. All the justices concurred.

Fall of Stone in Mine Shaft — Case for Jury.

In **MORBACH v. THE HOME MINING COMPANY**, 53 Kan. 731 (*July Term, 1894*), employee working in shaft of coal mine injured by the falling of a heavy stone from the side of the shaft, his side, hip, leg, etc., being injured, judgment for defendant mining company was *reversed*, it being held that there was sufficient evidence for plaintiff to go to a jury.

1. The **BROWN** case is reported with the Kansas cases on page 114, *post*.

Fall of Rock from Roof of Coal Mine—Special Findings—General Verdict.

In **CHEROKEE & PITTSBURG COAL & MINING CO. v. BRITTON**, ADM'R, 3 Kan. App. 292 (1896), employee killed by the falling of loose rock or earth from the roof of defendant's coal mine, judgment for plaintiff in the Crawford District Court was *reversed*, it being held that the special findings of fact were inconsistent with the general verdict and contrary to the evidence, and should have been set aside and new trial granted.

In the **BRITTON** case, *supra*, the liability of a mine owner for injury to employees and the evidence necessary to fix same, are very fully discussed, together with the general rules governing the law of master and servant, in the opinion rendered by **JOHNSON**, P. J.

EMPLOYEE EMPLOYED IN BRIDGE BUILDING FALLING FROM BRIDGE AND KILLED—DEFECTIVE PLANK OF SCAFFOLD—NEGLIGENCE NOT SHOWN.—In **KELLY, Adm'r v. DETROIT BRIDGE WORKS**, 17 Kan. 558 (*January Term, 1887*), action brought for the death of John Corbett, an employee who, while engaged with others in constructing a bridge, was accidentally killed by falling from a scaffold. There was a judgment for defendant in the Doniphan District Court which, on appeal by plaintiff was *affirmed*. The official syllabus to the report states the case as follows: "The plaintiff's evidence showed substantially the following facts: The plaintiff's intestate was a laborer in the employ of the defendant, assisting the defendant to build a bridge. Said intestate fell from said bridge and was killed. The fall was caused by a heavy step of the intestate on a defective board or plank, causing the plank or board to break in the middle, and allowing the intestate to fall about twenty-five feet. This plank was a part of a scaffold. The intestate and his co-laborers had erected said scaffold on the very morning that said accident occurred. How this particular plank came to be placed in said scaffold is not shown. There was plenty of good plank at the bridge from which to make a good scaffold. Whether anyone knew, prior to the accident, or even suspected, that this plank was defective, is not shown. The evidence, so far as it went, tended to show that all the planks were tested before they were used. It was not shown that the defendant was negligent in any respect whatever. And no negligence was shown against anyone, unless it may be inferred from the foregoing facts. The defendant demurred to the plaintiff's evidence on the ground that it did not prove any cause of action against the defendant. The decision of the trial court, sustaining the demurrer, was correct, and is affirmed."

DOMESTIC SERVANT MADE SICK BY BEING COMPELLED TO PERFORM UNUSUALLY HARD WORK FOR A GIRL OF TENDER YEARS—RIGHT OF ACTION BY PARENT.—In **LARSON v. BERQUIST et al.**, 34 Kan. 334 (*July Term, 1885*), judgment for defendants in the Republic District Court was *reversed*, the facts and points decided being sufficiently stated in the official syllabus as follows:

"1. In an action by a parent to recover damages for the wilful negligence and misconduct of the defendants toward his infant daughter while in their service, the plaintiff alleged that the daughter was an inexperienced girl of tender years, who was employed by the defendants as a house servant to do such work as was suitable to her years and strength, and that during her employment her menses began, causing her great pain and sickness, and that after gaining her confidence the defendants took advantage of her weakness, youth and inexperience, and in order that she might continue in their service, and perform a great and unusual amount of labor for them, they negligently, wilfully and wickedly advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy therefor was hard and unremitting labor; and that by reason of this advice and the influence exerted upon her by the defendants, she was exposed to danger and hardship, and made to do work for them far beyond her strength, and compelled to perform the labor of two persons, by reason of which she became very sick, and was permanently crippled and disabled, and that ever since that time her father has been not only deprived of her assistance and service, but has been compelled to expend for her care and medical attendance a large sum of money: *Held*, upon the demurrer, that the petitions stated a cause of action in favor of the plaintiff and against the defendants.

"2. In such a case the defendants were bound to exercise ordinary care and diligence to protect her from injury in the course of the employment, and as the servant was an infant of tender years, a higher degree of care and a greater precaution was required of the defendants than if she had been an adult of ordinary intelligence and judgment."

The plaintiff's daughter was employed as a house servant by defendants.

Liability of master for tort of servant.

In **MAIER v. RANDOLPH**, 33 Kan. 340 (*January Term, 1895*), it was held that "where a master instructed his servant to go to a certain place at a certain time and kill a beef, and the servant went to such place at such time, and finding no animal there except plaintiff's bull, killed the bull, skinned him, dressed him, and hung his carcass up in the slaughter house as a beef, honestly attempting to carry out his master's orders, the master is liable."

Judgment for plaintiffs was, however, reversed on erroneous admission of certain evidence.

Railroad company not liable for an assault by its agent upon a third person who was at its depot on business.

In *HUDSON v. MISSOURI, KANSAS & TEXAS R'y Co.*, 16 Kan. 470 (January Term, 1876), assault by an employee of defendant upon plaintiff, judgment for defendant in the Labette District Court was *affirmed*. The official syllabus states the case as follows:

"1. A master is not responsible for the tortious or wrongful acts of his servant, when these acts are not directly authorized by him, nor done in the course or within the scope of such servant's employment.

"2. A general allegation that the master by his servant made the assault, is overborne by a statement of the actual facts which shows a mere volunteer assault by the servant, and one outside the scope of his employment.

"3. Where it appears that plaintiff was authorized to receive freight for certain parties, and in pursuance thereof went to the depot of defendant and there demanded the same of the agent who was in charge of the depot and authorized to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it does not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of the defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business: *Held*, that it did not appear that the company was liable for the assault, and that only the agent who actually made it was liable."

Person contracting disease from ticket agent—Railroad company not liable without it had notice of the fact.

In *Long v. Chicago, Kansas & Western R. R. Co.*, 48 Kan. 28 (January Term, 1892), judgment sustaining demurrer to petition in the Kingman District Court was affirmed, the official syllabus sufficiently stating the case as follows: "Where a railroad company has in its employ an agent at a station authorized to sell tickets upon its line of road, and he happens at the time to be afflicted with a contagious disease, and another person comes in contact with such agent in purchasing at the station a railroad ticket, and thereby contracts from the agent the disease, the railroad company is not liable in damages therefor, if neither the company nor any of its superior officers had any knowledge that the ticket agent was afflicted with such a disease. In such a case, knowledge on the part of the railroad company is an element essential to liability."

ATCHISON, TOPEKA & SANTA FE RAILROAD
CO. v. WAGNER.

Supreme Court, Kansas, January Term, 1885.

[Reported in 33 Kan. 660.]

- ASSUMPTION OF RISK BY RAILROAD EMPLOYEE.**—1. An employee of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment.
- 2. RAILROAD COMPANY NOT INSURER OF MACHINERY.**—As between a railroad company and its employees, the railroad company is not an insurer of any of its machinery, appliances or instrumentalities for the operation of its railroad.
- 3. ORDINARY CARE TOWARD EMPLOYEE.**—As between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its railroad.
- 4. DUTY OF RAILROAD COMPANY—PRESUMPTION.**—It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty.
- 5. ACTION BY EMPLOYEE—BURDEN OF PROOF.**—And where an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice.
- 6. SAME—EVIDENCE.**—And proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities.
- 7. NOTICE OF DEFECTIVE MACHINERY.**—As between a railroad company and its employees, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.
- 8. PRACTICE—VERDICT NOT SUSTAINED—REVERSAL.**—Whenever the verdict of a jury, or any necessary and material fact involved in the verdict, is not sustained by the evidence, or by any sufficient evidence, the Supreme Court will set it aside and grant a new trial, although the verdict may have been approved by the trial court.

(Syllabus to official report.)

ERROR from Reno District Court. The facts appear in the opinion. *Judgment reversed.*

A. A. HURD, JOHN REID and W. C. CAMPBELL (GEO. W. MCCRARY, of counsel), for plaintiff in error.

WHITESIDE & HUTCHINSON, for defendant in error.

Valentine, J.—This was an action brought by Robert Wagner against the Atchison, Topeka & Santa Fe Railroad Company, for damages for personal injuries alleged to have resulted from the negligence of the defendant. The case was tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$2,000 and costs of suit; and from this judgment the defendant, by petition in error, appeals to this court.

It appears from the record brought to this court that on December 23, 1881, and prior thereto, Wagner was in the employment of the railroad company as a yard switchman at Nickerson, Kansas. His duties as switchman required him to couple and uncouple cars, make up trains, etc. Nickerson, being the end of a division of the defendant's railroad, it was customary at that place to take off a car or coach from the western-bound passenger train which arrived at that place each evening, and to put it on the eastern-bound passenger train the next morning. A switch engine was used for this purpose, and among the duties performed by Wagner were to couple and uncouple the passenger coach to and from this engine. The passenger coaches were equipped with a kind of drawbars usually known as "the Miller coupling," an invention by which coaches are coupled to each other automatically, without the use of links or pins. Links or pins, however, may be used in coupling rolling stock equipped with this kind of coupling, and are so used whenever a coach equipped with this kind of coupling is coupled to another coach or car or engine not so equipped. The switch-engine was equipped with an oval-faced drawhead, with two or three slots or shelves into which a link might be placed for coupling. One witness testified that this contrivance for coupling was called a "Hinckley switch-engine drawhead." In coupling or uncoupling coaches equipped with the Miller coupling to an engine equipped as this engine was, it was necessary to use a link and pins. On the morning of December 23, 1881, Wagner was ordered by J. W. Reed, the yardmaster, to get on the switch-engine, which had already been coupled to the passenger coach and was standing on

the sidetrack, and to place the passenger coach in the eastern-bound passenger train. Wagner got on the step or platform of the engine, and between the engine and the coach, for the purpose of obeying this order. The engine and coach were then moved by the engineer, in obedience to a signal from Wagner, and when they arrived at the proper place Wagner endeavored to uncouple the engine from the passenger coach, and in doing so he attempted first to pull the pin from the drawhead on the engine, but finding that the head of the pin was broken and the pin difficult of removal, he then reached over to the drawbar of the passenger coach and pulled that pin. The engine, at the time, was pushing against the coach, and the drawbar of the coach slipped by the drawhead of the engine, and catching the plaintiff's leg, broke it about two or three inches above the knee. This incapacitated him for work for a long time, and he endured pain and incurred expense, but his leg finally got to be nearly as well and sound as before the accident. No negligence is imputed to the yardmaster or to the engineer, and it is not claimed that the engine or the passenger coach was in any manner defective or out of order, except the defects in the coupling-pins, of which the plaintiff had full and complete knowledge, and the spring or appurtenances connected with the drawbar of the passenger coach, of which the plaintiff did not have any notice or knowledge. Indeed, no person is shown to have had any notice or knowledge of any defect in such drawbar, or in anything connected therewith; and it is certainly at least very doubtful whether there was in fact any such defect. The jury, however, upon very weak evidence, found that there was such a defect, and for the purposes of this case we shall assume that there was.

The question then arises, is the defendant liable because of such defect and upon the other facts of this case? We think not. It must be remembered that the question in this case does not arise between the railroad company and a passenger, or between the railroad company and some third person having no connection or contract relation with the railroad company; but it arises between the railroad company and one of its employees, who, by reason of his employment, has assumed all the ordinary risks and hazards incident to his employment. A passenger pays to be protected from all the risks and hazards incident to the operation of a railroad, from which the railroad company can, by the highest degree of skill and care, protect

him; while an employee of the railroad company is paid to assume all the risks and hazards incident to his employment; and a third person, having no connection or contract relation with the railroad company, stands upon his original legal rights, being neither protected by the railroad company nor assuming any of the dangers, risks or hazards incident to the operation of the railroad; and while such third person may not be placed in the same highly favorable situation with regard to dangers, risks and hazards as a passenger is, yet he is placed in a much more favorable situation than a mere employee of the railroad company, who is paid to take the risks and hazards of his employment. Hence, differences in the rules governing these various relations must be expected.

Mr. Thompson, in his work on Negligence, uses the following language: "In an action by an employee against his employer for injuries sustained by the former in the course of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." 2 Thompson on Negligence, § 48, p. 1053.

Mr. Wood, in his work on Master and Servant, uses the following language: "The servant seeking to recover for an injury, takes the burden upon himself of establishing negligence on the part of the master and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery: First. That the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or that in the exercise of that ordinary care which he is bound to observe he would have known it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all the usual and ordinary hazards of the business," etc. Wood on Master and Servant, § 382.

Shearman and Redfield, in their work on Negligence, use the following language: "In actions brought by servants against their masters, the burden of proof as to the master's

knowledge or culpability in lacking knowledge of the defect which led to the injury, whether in the character of a fellow-servant or in the quality of materials used, rests upon the plaintiff." *Shearm. & Redf. on Negligence*, § 99.

Mr. Pierce, in his work on Railroads, uses the following language: "The company's knowledge of a defect must be proved in order to make it liable for the consequences, but such knowledge may be shown by circumstances, as the length of time it existed before the injury, or by a notice given to an employee who had an express or implied authority to receive it. The fact that the servant complained of a defect in the road or its appointments is admissible in proof of the company's knowledge." *Pierce on Railroads*, 373. "The burden of proof is on the servant to show that the company was negligent, and that his own negligence did not contribute to the injury; and where the injury was caused by defects in the road or its appointments, that the company knew or ought to have known them, or negligently employed incompetent persons to construct or repair them; and where it is alleged to have been caused by the incompetency of fellow-servants, that the servant was incompetent, and the company knew or ought to have known of such incompetency; and he must show that he did not himself, before the injury, know of such defects or incompetency. The company's negligence is not to be inferred from the fact of injury by a collision of trains, or by an explosion of engines, even in jurisdictions where negligence is implied from the collision or explosion in case of injuries to passengers or third persons." *Pierce on Railroads*, 382.

The Supreme Court of Iowa, in a recent decision, uses the following language: "As to driving in the drawbar, there is no evidence whatever that any of the officers of the defendant had any knowledge that the drawbar was in any way defective, or that it was defective in its original construction. Without some evidence on this question, there could be no recovery for that defect, if there was any defect." *Skellinger v. C. & N. W. R'y Co.*, 61 Iowa, 714, 715.

There is a vast number of other cases announcing the same principles and sustaining the elementary works above cited, so far as we wish to apply them to this case, among which are the following: *De Graff v. N. Y. Cent. & H. R. R. Co.*, 76 N. Y. 125; *Warner v. Erie R'y Co.*, 39 N. Y. 468; *Elliott v. St. L. & I. M. R. Co.*, 67 Mo. 272; *Mobile & O. R. Co. v. Thomas*, 42

Ala. 672, 13 Am. Neg. Cas. 107; Col., C. & I. R'y Co. v. Troesch, 68 Ill. 545, 14 Am. Neg. Cas. 352; Chicago & A. R. Co. v. Platt, 89 Ill. 141, 14 Am. Neg. Cas. 343ⁿ; Ind., B. & W. R. Co. v. Toy, 91 Ill. 474, 14 Am. Neg. Cas. 354ⁿ; East St. L. P. & P. Co. v. Hightower, 92 Ill. 139, 14 Am. Neg. Cas. 245; Wonder v. B. & O. R. Co., 32 Md. 411 (1); Ballou v. C., M. & St. P. R'y Co., 54 Wis. 257; Smith v. C., M. & St. P. R'y Co., 42 Wis. 520; Flannagan v. C. & N. W. R'y Co., 50 Wis. 462; Ladd v. N. B. R'y Co., 119 Mass. 412 (2); Quincy Mining Co. v. Kitts, 42 Mich. 34 (3); Col. & I. C. R'y Co. v. Arnold, 31 Ind. 174, 14 Am. Neg. Cas. 546ⁿ; Mo. Pac. R'y Co. v. Lyde, 57 Tex. 505.

We think the following principles are deducible from the foregoing authorities, and are sound law: 1. An employee of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment. 2. As between a railroad company and its employees, the railroad company is not an insurer of the perfection of any of its machinery, appliances or instrumentalities for the operation of its railroad. 3. As between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its railroad. 4. It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty. 5. And where an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such

1. The WONDER case is reported with the Maryland cases in this volume, p. 352, *post*.

the Massachusetts cases in this volume, p. 491, *post*.

2. The LADD case is reported with

3. The KITTS case is reported with the Michigan cases at the end of this volume of AM. NEG. CAS.

notice. 6. And proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities. 7. As between a railroad company and its employees, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.

The decisions in this State are, so far as they go, in consonance with the decisions elsewhere. *Kelly v. Detroit Bridge Works*, 17 Kan. 558, 562, 15 Am. Neg. Cas. 16, *ante*; *Mo. Pac. R'y Co. v. Haley*, 25 Kan. 35, 56, 62, 63; *Atch., T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Jackson v. K. C., L. & S. K. R. Co.*, 31 Kan. 761 (1).

In the present case, as no negligence is imputed to the railroad company, except in using a passenger coach with a draw-bar connected with a defective spring, or with some other defective appliance, and as it is not shown that the railroad company, or any of its employees, or, indeed, any other person, had any knowledge or notice of such defect prior to the occurrence of the accident upon which the plaintiff's action is founded, it cannot be said that any negligence whatever upon the part of the railroad company has been shown; and the verdict and judgment in the court below should have been rendered in favor of the railroad company, but they were not; but, on the contrary, both were rendered against the railroad company. After the verdict was rendered the defendant moved the court to set it aside and for a new trial, upon various grounds, among which were the grounds that the verdict was not sustained by sufficient evidence, and was contrary to law; but the court overruled the motion and rendered the judgment aforesaid. Of course, by this ruling, the court approved the verdict of the jury. But as the verdict and judgment are not sustained by sufficient evidence, although approved by the trial court, it becomes the duty of this court to set them aside and grant a new trial. It has frequently been held in this court

1. See these cases reported with the Kansas cases in this volume of AM. NEG. CAS. pages 117, 59 and 128, *post*.

that whenever the verdict of a jury, or any necessary and material fact involved in the verdict, is not sustained by the evidence, or by any sufficient evidence, the Supreme Court will set it aside and grant a new trial, although the verdict may have been approved by the trial court. *Backus v. Clark*, 1 Kan. 304; *Ermul v. Kullok*, 3 Kan. 499; *Howe v. Lincoln*, 23 Kan. 468; *Irwin v. Thompson*, 27 Kan. 643; *U. P. R'y Co. v. Dyche*, 28 Kan. 200, 206; *Johnson v. Burns*, 29 Kan. 81, 86; *Reynolds v. Fleming*, 30 Kan. 106; *Babcock v. Dieter*, 30 Kan. 172.

The judgment of the court below will be reversed and the cause remanded for a new trial. All the justices concurring.

KANSAS PACIFIC RAILWAY COMPANY v. PEAVEY.

Supreme Court, Kansas, July Term, 1885.

[Reported in 34 Kan. 472.]

CASE FOLLOWED.—1. The case of *Kan. Pac. R'y Co. v. Peavey*, 29 Kan. 169, referred to and *followed* (1).

2. INCOMPETENCY OF CO-EMPLOYEE — ASSUMPTION OF RISK.—

If an employee knows that another employee is incompetent or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection, and without being induced by

1. In *KANSAS PACIFIC RY. CO. v. PEAVEY*, 29 Kan. 169 (January Term, 1883), judgment for plaintiff for \$6,500 in the Wyandotte District Court was *reversed* on the grounds stated in the syllabus to the official report as follows:

"1. A railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in this State by chapter 93, Laws of 1874, and a contract in contravention of this statute is void, and no defense to an action brought by an employee of a railroad company for damages done to him in consequence of the negligence or mismanagement of a co-employee.

"2. Opinion is inadmissible on questions which can be decided by the jury on the facts.

"3. Instructions should, as far as possible, conform to the actual facts in proof, and where there is no evidence in an action for damages resulting from the alleged negligence of the defendant, tending to show that the injuries were caused by such gross negligence on the part of the defendant or his servants as to imply wanton or wilful injury, an instruction that if the jury believe from the evidence the accident in question was attributable to the want of ordinary care on the part of the plaintiff, he cannot recover, unless the jury further believe from the evidence that the defendant was guilty of such

his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence or defects, and cannot recover for an injury resulting therefrom.

3. CONTRIBUTORY NEGLIGENCE—RULES.—The rules of contributory negligence have not been abolished by the Act of the legislature making railroad companies liable for an injury to an employee resulting from the negligence of a co-employee (Comp. Laws of 1879, ch. 84, par. 4914), nor have such rules in cases like this been abolished by any statute, nor even disturbed.
4. HABITUAL NEGLIGENCE—INSTRUCTIONS.—Where an employee sues a railroad company for injuries alleged to have resulted from the negligence of a co-employee, and evidence is introduced on the trial tending to show the habitual negligence of such co-employee, and that the plaintiff had knowledge thereof, and the defendant attempted, by asking the court to give certain instructions, to submit the question of the co-employee's incompetency and habitual negligence and the plaintiff's knowledge thereof to the jury, but the court refused, *held*, error.
5. FINDING AGAINST EVIDENCE.—And in such a case, where the evidence tended to show that the plaintiff had full knowledge of the habits, skill and attention of such co-employee, and a special question was submitted to the jury for them to find thereon, and the jury found that there was no such evidence, *held*, that such finding is against the evidence, and is not true.
6. QUESTION FOR JURY.—The question as to whether the plaintiff was guilty of contributory negligence, or not, in this and other respects, was a question of fact which should have been submitted to the jury.
7. MISLEADING INSTRUCTIONS.—Where the plaintiff *voluntarily placed himself* in a position of danger, and was injured by the alleged negligence of a *single* co-employee, and the court instructed the jury that "If he [the plaintiff] did all that a prudent and careful man could or should do

gross negligence as implies wilful injury, is erroneous and misleading.

"4. Where two parties, each of whom is under duty to exercise ordinary care, are guilty of negligence contributing to the injury of one of them, the injured party cannot recover damages therefor from the other on the sole ground that his negligence was less than that of the other.

"5. In an action against a railway company for personal injuries, brought by an employee of the company, in a case where the company is liable only for ordinary negligence, and not for slight negligence, if the plaintiff himself is guilty of ordinary negligence contributing to the injury, he cannot recover, if the negligence of the railway company or a fellow-

employee is merely greater than his, for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, to sustain his action.

"6. In an action brought by a brakeman for personal injuries received in attempting to couple two cars together, where the sole permanent disability is the loss of the thumb and first finger of the right hand, and where the party from such injury was laid up a little over a month and could not do anything for three or four months, a verdict of \$6,500 is so excessive as to show that it was given under the influence of passion or prejudice, and ought to be submitted to the judgment of another jury."

in the situation *in which he was placed* and his calamity was brought upon him by the negligence of other employees, he is entitled to recover." *Held*, that such instruction is inexact and erroneous; and where the court immediately afterward, and in the same connection, instructed the jury that their verdict should be their conscientious judgment on the facts of the case, "*applying the law as here given*," *held* that these two instructions may have misled the jury.

8. SPECIAL QUESTIONS — EVASIVE ANSWERS.— Where the plaintiff sued a railroad company for injuries alleged to have been received by him while attempting to couple two cars together, and alleged to have resulted from the negligence of a co-employee in moving the car to be coupled at too great a velocity, and the evidence tended to show that the plaintiff might have taken a position prior to his attempt to make the coupling, from which position he could have determined with a great degree of accuracy the rate of speed at which the car was moving; but that he did not do so, but took a place from which he could not estimate the rate of speed at which the car was moving with any degree of accuracy, and from which place he attempted to make the coupling, in ignorance of such rate of speed, and was injured; and the railroad company claimed that the plaintiff was guilty of contributory negligence in this respect; and the court submitted the following special questions to the jury for their consideration, and the jury returned the following answers, to wit: "Q. 27. Did not the plaintiff of his own will occupy a position which prevented him from ascertaining the speed of the car which injured him? A. We think he occupied the usual place for making the coupling. Q. 28. Could he not have taken such a position as would have enabled him to determine the speed of the car before he attempted to couple? A. To make the coupling he could not:" *Held*, that these answers are evasive and unsatisfactory, and the court erred in refusing, upon the request of the defendant, to require the jury to answer them properly.
9. DEFECTIVE FINDINGS.— The evidence and the special findings of the jury commented upon, and held to be defective with regard to the negligence alleged by the plaintiff against the plaintiff's co-employee.
10. SPECIAL QUESTIONS — ANSWERS FAVORABLE TO DEFENDANT.— Where an employee sues a railroad company for the alleged negligence of his co-employee, and special questions with reference to facts tending to show the negligence of such co-employee are submitted to the jury, and the court instructs the jury that if there is no sufficient evidence to warrant a finding upon any of these special questions, that the jury may answer "Don't know," and the jury answer some of the special questions upon this subject in that manner: *Held*, that, as the burden of proving the negligence of such co-employee rests upon the plaintiff, the answers "Don't know" to such questions are favorable to the railroad company, and not to the plaintiff, although the jury may have intended them otherwise.
11. SAME — INSTRUCTION.— And *further held*, that the court erred in instructing the jury that they might, under any circumstances, answer special questions of fact by merely saying "Don't know."
12. DAMAGES — EXCESSIVE VERDICT.— In an action for an alleged injury, where the injury and loss to the plaintiff were and are merely

the loss of a thumb and forefinger of his right hand, the consequent suffering and inconvenience from such loss, a nominal sum of money paid for medicines, and some loss of time while the wound was being cured, held, that a verdict for \$8,000 is so excessive as to show passion or prejudice on the part of the jury; and even in such a case where the plaintiff remits \$1,500 of such verdict, and takes a judgment for \$6,500, the amount is still so grossly excessive that the judgment should not be allowed to stand. (29 Kan. 170.)

(*Official syllabus.*)

ERROR from Wyandotte District Court. *Judgment reversed.*

This case has once before been in this court, and will be found reported in 29 Kan. 169 (and 11 Am. & Eng. R. R. Cas. 260), where the pleadings as they then were are set out in full. When the case was formerly here the judgment of the lower court was reversed, and the cause remanded for a new trial. On its return to the court below the defendant, with leave of the court, amended its answer as follows:

"And this defendant, for further answer and by way of amendment, and in lieu of the second paragraph of its answer, says that the plaintiff executed the agreement in said paragraph of the answer mentioned; that at the time of the execution of the said agreement, John Ellis, in the petition mentioned, was in the service of the defendant, and the plaintiff had served with him and well knew his capacity, habits and manner of handling an engine; that the plaintiff was also a locomotive engineer, and as a locomotive engineer, train dispatcher and brakeman in and about railroad yards, was thoroughly experienced at the time he took service with the defendant, and he ever after that — that is to say, for four years or more — he well knew that it was dangerous, as in fact it was, to engage in the coupling of cars moving detached from the engine without strictly observing the speed of the detached car; and he also believed that he, said John Ellis, was liable to fail to observe signals and to so handle the locomotive as to send the car back faster than it was safe for the brakeman to undertake to couple it; and before the injury complained of said plaintiff had represented to his superior officer, having power to employ and discharge defendant's servants in the yard, that Ellis was liable to send cars back too fast; and yet, well knowing the habits and capacity of the said Ellis, he took service with him and continued in such service for a long time after he had so complained — that is to say, for six months or more — well knowing that he was under obligation by his agreement to quit

the service of the company if he had reason to suspect that his co-servants were incompetent or careless, which he was at liberty at any time to do. There was no promise made to him to discharge Ellis, or take any measures to correct or change the manner of service in the yards, of which plaintiff complained; and the said plaintiff, knowing all the facts, and his liability to injury (the said Ellis at the time of the injury being under his control and direction and subject to his signals), ordered by signals a car to be detached from the engine which Ellis was operating, and sent or kicked back unattended — he intending to couple said detached car to a standing car when they should come together. And, although the plaintiff believed that Ellis was likely to disregard or fail to observe his signals, and send said car back too fast, yet, without observing or knowing whether this signal was understood by Ellis, and without noticing the speed of the car, or how far distant it was cut off, or paying any attention whatever to said Ellis, the locomotive, or the car, as it was his duty to do, he did carelessly and heedlessly place himself in position to make coupling of the cars, without first taking proper care to know whether it could be safely done; and while attempting to do so, was by his own carelessness, heedlessness and negligence injured in the manner complained of."

August 25, 1884, the plaintiff Peavey recovered a judgment for \$6,500 and costs against the defendant railway company. It brings this judgment here for review. The material facts are stated in the opinion.

J. P. USHER, for plaintiff in error.

THOMAS P. FENLON and JOHN B. SCROGGS, for defendant in error.

Valentine, J.—This was an action brought in the District Court of Wyandotte county by Joseph Peavey against the Kansas Pacific Railway Company to recover damages for an alleged injury to the plaintiff, claimed to have been caused by the negligence of John Ellis, a switch engineer in the employment of the defendant. It appears from the record that on August 23, 1879, V. S. Lucas was the yardmaster at the defendant's car-repair yards at Armstrong, Kansas; that the plaintiff and Abram Myers were yardmen, brakemen and switchmen at that place; that John Ellis was a switch engineer at the same place, and that Almon Noble was the fireman on Ellis's engine, and all were in the employment of the defendant railway com-

pany. On that day Ellis, with his engine, was moving a flat-car toward another car in that yard, and when within about 200 feet thereof Myers uncoupled the flat-car from the engine, and Ellis stopped his engine, and the flat-car, of its own *momentum* moved forward toward the other car, and when near thereto the plaintiff attempted to couple the two cars together; but in doing so he had the thumb and forefinger of his right hand so crushed that he lost them both. The alleged negligence on the part of Ellis, the engineer, was in his giving the flat-car too strong a push, or "kick," thereby propelling it forward at too great a velocity. The case was tried before the court and a jury, and for the foregoing negligence and injury the jury rendered a verdict in favor of the plaintiff and against the defendant for the sum of \$8,000. The plaintiff remitted \$1,500 thereof, and the court below rendered judgment in favor of the plaintiff and against the defendant for the sum of \$6,500 and costs; and to reverse this judgment the defendant now brings the case to this court.

Some of the questions involved in this case have already been decided by this court. *Kan. Pac. Ry. Co. v. Peavey*, 29 Kan. 169 (same case, 11 Am. & Eng. R. R. Cas. 260, 44 Am. Rep. 630). But other questions are now raised. A vast number of objections are now urged against particular rulings of the court below, in admitting and excluding testimony, in refusing to strike out certain portions of the testimony; in giving and refusing instructions; in refusing to require the jury to answer certain special questions of fact; in refusing to strike out certain answers of the jury to certain special questions of fact; in overruling the defendant's motion for a new trial; in refusing to render judgment in favor of the defendant on the special findings, etc.

It is claimed by the plaintiff in error, defendant below, that by virtue of the contract entered into between the plaintiff below and the defendant below, on August 11, 1875, a copy of which contract is set out in full in 29 Kan. 173, and in 11 Am. & Eng. R. R. Cas. 262, 263, the plaintiff cannot recover; that the alleged negligence of Ellis was at most only the negligence of a fellow-servant, a co-employee, and not the negligence of the railroad company itself, and that with regard to such negligence the contract is valid and precludes a recovery. A majority of this court, however, when the case was formerly here, decided against this claim of the defendant below. While the

writer of this opinion concurred in the most of that decision, yet he did not concur in this particular portion thereof, and he still thinks it erroneous. The correctness of that decision is now challenged by counsel for defendant below. He claims that it is against authority and erroneous upon general principles, and cites in support of his claim the case of *Griffiths v. Earl of Dudley*, 9 L. R., Q. B. Div. 357 (1), and the note to the case of *Kan. Pac. R'y Co. v. Peavey*, 11 Am. & Eng. R. R. Cas. 276. (See also note to *Peavey's case*, in 44 Am. Rep. 633.)

It is also claimed by counsel for defendant below that even if the aforesaid contract be held to be against public policy and void, so far as it permits a waiver or release of damages resulting from negligence, still that the following provisions which are contained in the contract must be held to be valid, at least so far as they apply to the acts of mere fellow-servants in the same common employment, to wit:

"And I agree that before exposing myself to danger in coupling or uncoupling, handling, using or moving any engine or car, I will examine the condition and sufficiency thereof, and if found in any respect defective or insufficient, that I will report the same forthwith to the person under whose immediate supervision I am employed. And I hereby further agree to rely, at all times, upon my own judgment as to the condition and sufficiency of all the articles, machinery, implements and

1. In *Griffiths v. Dudley* (Earl of), 9 Q. B. Div. 357, the English Court of Queen's Bench, in discussing The Employers' Liability Act, 1880, said in substance: "It is competent to a workman to contract with his employer not to claim compensation for personal injuries under The Employers' Liability Act, 1880. By section 1 of that Act, where personal injury is caused to a workman in certain specified cases, the workman, or, in case the injury results in death, his legal personal representatives, and any person entitled in case of death, 'shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.'"

The points decided in *Griffiths v.*

Dudley, *supra*, were: "A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the Act for personal injury whether resulting in death or not: *Held*, that section 1 of The Employers' Liability Act, 1880, only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid. *Held*, also, that the contract was not against public policy, and that the workman's widow, suing for damages under Lord Campbell's Act, was bound by it."

tools herein enumerated, and used by said company, and also as to the *competency and skillfulness of its servants* in all grades and departments, and that I will quit the employment of said company whenever I am unwilling to abide by the terms of this agreement."

It is claimed that freedom to contract should be the universal rule, unless the contract is clearly and manifestly illegal, immoral, or against public policy; and it is further claimed that no contract should be construed to be against the spirit or policy of a statute unless the statute itself in express terms or by the clearest of implications shows that the contract is in contravention of its spirit and policy; and it is further claimed that this rule of construction is particularly applicable where the statute itself is of recent origin and in derogation of the principles of the common law which have existed for centuries and been established from time immemorial. There is no claim that the present contract is illegal, immoral or against public policy, unless it is against the spirit or policy of chapter 93 of the Laws of 1874 (Comp. Laws of 1879, ch. 84, par. 4914), which goes to the extent of making railroad companies liable for injuries to a servant or employee, resulting from the negligence of a fellow-servant or co-employee while in the same common employment (1). While the writer of this opinion is still of the opinion that the decision made by this court, holding that the contract between the plaintiff and the defendant was against public policy and void, is erroneous, still he has no disposition now to weaken the force or effect of that decision. That decision makes the law to be in Kansas precisely what an express provision of the statute makes the law to be in Iowa; and, therefore, the law as thus made, cannot be very bad; indeed, the writer of this opinion is inclined to think that it would be better if the legislature should go further, and prohibit the present mode of coupling cars with links and pins, and should require that automatic or self-coupling appliances should be used in all cases, and should enact that railroad companies should in all cases be absolutely liable for injuries resulting from the use of links and pins in coupling cars. The

1. Section 1, chapter 93 of the Laws of 1874 (Kansas), is as follows: "Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage."

amount of injury suffered from this source is frightful. The longest and most varied experience cannot exempt the car-coupler in every case from injury. But so long as the law remains as it is, the courts have no discretion but to enforce it. Following the decision heretofore made in this case, we cannot see that it is necessary to make any further comment with reference to said contract.

One of the rules of the common law which we think is still in force, is as follows: If an employee knows that another employee is incompetent, or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom. *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357, 14 Am. Neg. Cas. 603; *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521, 2 Thomp. on Negl. 932; *McQueen v. C. B. U. P. R. Co.*, 30 Kan. 689; *Jackson v. K. C., L. & S. K. R. Co.*, 31 Kan. 761 (1); 2 Thomp. on Negl. 1008-1018, §§ 15-23, and cases there cited. Now, holding, as we still do, that the aforesaid contract is void to the extent that it has already been held to be void by this court, we think that the defendant cannot claim anything more favorable to itself under the contract than may rightfully be claimed under the foregoing rule of the common law. It is admitted, so far as this case is concerned, that the rules of contributory negligence have not been abolished by the foregoing statute, or by any statute, nor even disturbed. There was evidence introduced on the trial tending to show that Ellis "was passionate, and was in the habit of sending cars back too hard, and would not obey signals," and that the plaintiff had full knowledge of all these things as early as the summer of 1878; and the defendant attempted, by asking the court to give certain instructions, to submit the question of Ellis's incompetency and habitual negligence and the plaintiff's knowledge thereof to the jury, but the court refused, and the defendant excepted. In this we think the court committed error. Peavey knew Ellis's competency, capacity and habits; and he well knew them, for he himself had ample capacity and opportunity to judge. They had been co-employees together in the

1. The Jackson case is reported with the Kansas cases in this volume of AM. NEG. CAS., page 128, *post*.

same yard for a long time. Also, Peavey himself had great experience as a railroad man. In all probability he was the most competent of all the railroad men who had any connection with the injury. He had been in railroad employment for about twenty years, and had been fireman, engineer, brakeman, conductor, train dispatcher, etc. He was next in authority to Lucas, the yardmaster, but had had a much longer and more varied experience than even Lucas. But, notwithstanding all the foregoing facts, the jury found specially as follows:

"Q. 32. Did not the plaintiff well know the habits, skill and attention of John Ellis to his duties?

"A. There is no evidence to show that he did."

This finding is not what it should have been. Indeed, it is against the evidence, and not true. The defendant also claims that the plaintiff was guilty of contributory negligence in other respects. It claims that if the car was moving at too great a speed for safe coupling, the plaintiff should have known it, and should not have attempted to make the coupling; that he was competent, and master of the situation; that if he could not have known the speed of the car from the place where he was required to stand to make the coupling, he should have removed from that place, laterally, a sufficient distance from the track to have enabled him to determine such speed. It was in evidence that if the plaintiff had stood ten feet or more from the track, or at as great a distance from the track as the approaching car was from the place where the coupling was to be made, he could have estimated the rate of speed at which the car was moving with considerable accuracy; and of course if the car was moving at a velocity too great for safe coupling, it was Peavey's duty not to attempt to make the coupling; and if he did make such attempt under such circumstances, he was guilty of such contributory negligence as would preclude his recovery. There was some opinion evidence introduced by the plaintiff, over the objections of the defendant, tending to show that the plaintiff could not determine the rate of speed of the approaching car from the place where he was required to stand to make the coupling. Of course he could not have determined such rate of speed from that place with the same degree of accuracy as he could from a place a few feet or many feet from the railroad track; but that would not excuse his negligence, if in fact he was negligent and careless in taking a position where he could not make any proper estimate of the

rate of speed at which the car was moving without first having resorted to all the reasonable and available means for ascertaining such rate of speed. As to what the evidence with respect to these matters proved, and whether it showed that the plaintiff was guilty of contributory negligence or not in this respect, were properly questions of fact to be submitted to the jury, and we think they were fairly submitted to the jury, except for some slight want of precision and accuracy in some of the instructions. For instance, the court instructed the jury, among other things, as follows: "If he [Peavey] did all that a prudent and careful man could or should do in the situation *in which he was placed*, and his calamity was brought upon him by the negligence of the other *employees*, he is entitled to recover." Now Peavey *voluntarily placed* himself in the situation where he was injured, and was not *placed* there by others, or by the order of others, and there is no claim by the plaintiff that his calamity was brought upon him by the negligence of any other employee than Ellis. This instruction is inexact and erroneous. And immediately after the giving of this instruction, and in connection therewith, the jury were further instructed by the court that their verdict should be their conscientious judgment on the facts of the case, "applying *the law as here given* for your [their] observance." These two instructions together may have misled the jury, and in all probability the jury, for some reason, did not fairly consider the question of Peavey's negligence in placing himself in said situation of danger. Special questions upon this subject were submitted to the jury for their consideration. Two of such questions, with their answers, are as follows:

"Q. 27. Did not the plaintiff, of his own will, occupy a position which prevented him from ascertaining the speed of the car which injured him? A. We think he occupied the usual place for making the coupling.

"Q. 28. Could he not have taken such a position as would have enabled him to determine the speed of the car before he attempted to couple? A. To make the coupling he could not."

These answers were evasive and unsatisfactory. No one questioned or doubted the fact that the plaintiff, when he attempted to make the coupling, "occupied the usual place for making the coupling," and that "to make the coupling he could not" have been at a point sufficiently distant from the track to have estimated accurately the rate of speed at which

the car was moving; but the mooted question was not one of these, but was whether he could not have taken a position a short distance from the track, prior to his attempting to make the coupling, from which position he could have ascertained with a great degree of accuracy the speed of the car, and have thereby known whether it was prudent or safe for him to attempt to make the coupling or not. If it was prudent, he could have then made the coupling; if not prudent, he should not have attempted to do so. He was master of the situation. The car was about 200 feet distant when it was first detached from the engine, and it would seem that he had plenty of time for all this. Upon the return of these questions and answers to the court, the defendant asked the court to require the jury to answer the questions properly, but the court refused, and in this we think the court committed error. From the evidence, the instructions, and the findings of the jury, as made, we think we should assume that the plaintiff exercised proper care and diligence at the place where he attempted to make the coupling; but the question whether he exercised proper care and diligence in taking that place before ascertaining the speed of the approaching car, is still an open, unascertained and undecided question, and the court erred in refusing to require the jury to decide it. It was certainly material.

The only negligence charged against Ellis is that he applied too much power in moving the car. Now, there is no evidence tending to show that Ellis had any knowledge that the car was to be detached from the engine until the time when the signal was given for such detachment; there was no evidence tending to show that Ellis had any knowledge as to the purpose for which the car was to be detached or as to the distance which it was expected or intended the car should go; and there was no evidence tending to show that Ellis was moving the engine and car more rapidly than he was permitted to do in that yard, or more rapidly than safety would ordinarily permit, and no evidence that he moved the car any faster after it was detached than before. Indeed, the evidence tends to show the reverse. It tends to show that as soon as the car was detached from the engine the car and engine separated, the car moving faster than the engine, and the engine stopping within ten or fifteen feet. Could Ellis be negligent under such circumstances? But before answering this question many other matters must be taken into consideration. It would seem that in order that

Ellis should be considered as negligent he should have known that the car was to be detached, and when and where it was to be detached, and for what purpose it was to be detached, and the distance it was expected that the car would move after being detached; also, the nature of the track, its smoothness or roughness and the grade, and the condition of the car, whether it moved easily or not, and whether it had recently been oiled or not; and, knowing all these things, he should then have been capable of estimating the amount of steam necessary to be applied to the engine in order to drive the car to the point of its destination at a speed ranging only from two to three miles an hour. Now, with Ellis's want of knowledge as to whether the car was to be detached at all or not, as to when or where it was to be detached, for what purpose it was to be detached, the distance it was to go, etc., was he bound to make such close calculations with regard to the power to be applied to his engine as to give the car a particular rate of speed when it should be detached, when the plaintiff, who knew that the car was to be detached, when and where it was to be detached, for what purpose it was to be detached and where it was to go, is virtually relieved by the decision of the court below from the necessity of having any knowledge of the speed with which the car was actually moving after it was detached. It might have been profitable for the jury to have compared the negligence of Ellis with that of the plaintiff, but the court, at the request of the *defendant*, instructed the jury that they must not do so. This instruction would indicate that the defendant, or rather the defendant's counsel, believed that the negligence of Ellis was greater than that of Peavey; and possibly it was. But still the question remains: How could Ellis calculate the amount of steam that should be applied to send any car, on any track, for an unknown distance, at a particular rate of speed, when the plaintiff could not estimate the rate of speed at which this particular car was *actually* moving? In this particular case the grade was descending, the track smooth, and the car was an ordinary flat-car; and all these things the plaintiff and Ellis and the others were required to know; but whether the car would move easily or not, whether it had recently been oiled or not, whether it was to be detached or not, and if so, for what purpose it was to be detached, and when and where, and the distance it was expected to go after being detached, Ellis was, so far as the record shows, entirely

ignorant, while of some of these things at least, and possibly all, the plaintiff had full knowledge. Of course all could see the standing car about 200 feet distant from where the other car was detached, but Ellis did not know that the moving car was to go only to the standing car, or that the two were to be coupled together.

There seems to be a defect in the evidence, and also in some of the findings, as to the supposed negligence of Ellis; and yet it devolved upon the plaintiff to prove such negligence. We have already made sufficient statements with regard to the defects in the evidence, and as tending to show some of the defects in the findings upon this subject, we would give the following special findings of the jury, to wit:

"Q. 33½. Were not the car and locomotive in motion going toward Peavey, when he gave the signal to Myers to cut the car off? A. We don't know."

"Q. 34. Did Ellis know that the car was to be cut off and run alone toward Peavey until Peavey gave the signal to cut off, and if he did, say how he was informed of it and by whom? A. We don't know."

"Q. 29. What rate of speed was the engine moving at the time the car was cut off from it? A. We don't know."

"Q. 22. Did Ellis know that plaintiff was ignorant of the speed of the car? A. We don't know."

"Q. 16. Was the movement of the locomotive arrested, as soon as it was usual or practicable to do it, after he received the signal? A. We don't know."

As before stated, there was no evidence introduced tending to show that any additional impetus or motion was given to the car by the engine after the car was detached from the engine. Indeed, the evidence tends to show the reverse. Under the instructions of the court the answers to these questions are in favor of the defendant, although it is possible the jury intended them the other way.

The court instructed the jury with regard to the special findings as follows:

"The jury will answer the questions in the affirmative upon a preponderance of the evidence bearing on that point. If they find the testimony evenly balanced, or not supported by a preponderance of the evidence, they will answer in the negative, and if not sufficient evidence in favor or against any question to warrant an intelligent answer, they will say 'Don't know.'"

By virtue of the foregoing instruction and answers, it must be assumed that the engine and car were in motion, going toward the plaintiff, when he gave the signal for the car to be detached; that Ellis did not know, prior to that time, that the car was to be detached; that the engine and car, prior to that time, were not moving at a dangerous rate of speed; that Ellis did not know that the plaintiff was ignorant of the rate of speed at which the car and engine were moving, and the engine was stopped in its movement as soon as it was practicable to stop it after the detachment; for the jury, in effect, found that there was no evidence to the contrary, and the burden of introducing such evidence, if any could be obtained, rested upon the plaintiff, and not upon the defendant; that is, the burden of showing that Ellis was negligent rested upon the plaintiff, and not upon the defendant. The foregoing instruction, however, was itself erroneous. The trial court should not have given it, for where such an instruction is given the jury will generally answer many of the questions by simply saying "Don't know," when in fact they might and ought to give, under the evidence, intelligent answers to the questions. In the present case, out of thirty-six special questions presented to the jury, they answered nine of them by simply saying "Don't know." They also answered parts of two others in the same manner, and also answered two others in substantially the same manner — virtually answering thirteen questions by simply saying that they did not know, or that there was no evidence upon the subject. Of course it is proper in some instances, where the jury have made an honest effort to answer the questions properly and have honestly failed, for the court to relieve them from giving proper answers and to permit them to give answers by merely saying they "don't know." But the court should not permit the jury to make such answers until the court is satisfied that the jury have faithfully endeavored to answer the questions properly and failed to do so, and until after the court is satisfied that the jury cannot answer the questions in any other manner.

We now come to the last point made in the case, and that is, that the verdict is so excessive as to show passion or prejudice on the part of the jury. This point is undoubtedly well taken. The injury and loss to the plaintiff are merely the loss of a thumb and forefinger, the consequent suffering and inconvenience from such loss, a nominal sum of money paid for medi-

cines, and some loss of time while the wound was being cured. It does not appear that the plaintiff paid anything for surgical or medical attendance, or for nursing, and he cannot tell what he paid for medicines, whether one dollar or five, or some other small sum. The defendant's surgeon attended him at the defendant's expense. Now, a verdict for \$8,000 for such an injury certainly shows passion or prejudice. The plaintiff, however, remitted \$1,500 thereof, and took a judgment for \$6,500; but even this amount is grossly excessive, and a judgment for such an amount for such an injury should not be allowed to stand. (29 Kan. 170.) If the contest had been between two persons in ordinary circumstances, the jury in all probability would not have allowed \$1,000, possibly not \$500, even if they had allowed anything.

There are some other questions presented in this case, and the court committed a few other errors, but as we have already discussed the principal questions involved and the principal errors committed, we do not deem it necessary to add anything further to this opinion, except that we might say that some of the errors committed are so trivial that they would not require or even authorize a reversal of the judgment below. Indeed, some of the errors which we have commented on probably come within this category of trivial errors; but, taking all the errors together, including the excessive judgment, and they present such a strong case of error that no proper course is left but to reverse the judgment.

The judgment of the court below will be reversed, and the cause remanded for a new trial. All the justices concurred.

Brakeman Injured Coupling Cars—Pleading and Practice—Insufficiency of Complaint.

In *DOW v. KANSAS PACIFIC R'Y CO.*, 8 Kan. 642 (*July Term, 1871*), brakeman while coupling cars injured by his left shoulder and side being broken, judgment sustaining demurrer in the Shawnee District Court was *affirmed*. The points decided are stated in the official syllabus as follows:

"1. In an action by a brakeman against the railway company for injuries caused through the negligence of the conductor, the petition will be held insufficient on demurrer if it fail to show that the railway company was negligent in employing or retaining the conductor.

"2. As to passengers, and generally as to any person not in the employ of the company, the negligence of any agent or servant of the company is the negligence of the company. But as between co-

employees, as a conductor and a brakeman running on the same train, the negligence of either is not the negligence of the company, unless the company was negligent in employing or retaining such conductor or brakeman."

Employee Coupling Cars—Excessive Damages—Dow Case Followed.

The ruling in the Dow case (preceding paragraph) was followed in the case of *UNION PACIFIC R'Y CO. v. MILLIKEN*, 8 Kan. 647 (*July Term, 1871*) an action by a watchman and yardman for injuries sustained while coupling cars, caused by the negligent act of the engineer. There was a verdict and judgment for plaintiff in the Leavenworth District Court for \$10,000 which, however, was *reversed* on the ground of excessive damages—the injuries being the loss of a hand.

BRAKEMAN KILLED WHILE ATTEMPTING TO COUPLE CARS IN RAILROAD YARD—CONTRIBUTORY NEGLIGENCE—MISLEADING INSTRUCTION.—In *ATCHISON, TOPEKA & SANTA FE R. R. CO. v. PLUNKETT*, Adm'r, 25 Kan. 188 (*January Term, 1881*), where plaintiff's intestate, a brakeman or yard switchman, was killed while attempting to couple two cars in the railroad yard, loaded with projecting timbers, judgment for plaintiff in the Atchison District Court for \$1,300 was *reversed*, for refusal of trial court to submit to the jury certain questions requested by defendant and for misleading instruction on contributory negligence. The facts of the case are stated in the opinion by VALENTINE, J., as follows:

"On the 28th day of June, 1878, Peter Plunkett was killed by being caught between the timbers loaded on two cars then in the car yard of the Atchison, Topeka & Santa Fe Railroad Company, at Atchison, Kansas. At the time of his death, Peter Plunkett was in the employ of the railroad company, as brakeman or yard switchman. At the time he was killed he was in the discharge of his duty as brakeman or yard switchman, and had been in the employment of the railroad company for about five months previous to his death, which was on June 28, 1878. He was killed, while attempting to couple two cars in the railroad company's yard, then loaded with projecting timbers. The yard-master of the railroad company instructed and ordered Plunkett to couple two flat cars that were then improperly and negligently loaded with projecting timbers. Five to eight hours previous to the death of Peter Plunkett, the yard-master had notice of the manner in which said cars were loaded. After the yard-master of the railroad company had knowledge of the manner in which the timber of said cars were projected, he ordered and instructed Peter Plunkett to couple the same

together. In obedience to such order of the yard-master, Peter Plunkett attempted to make the coupling of said cars, so loaded with projecting timbers. The death of Peter Plunkett was caused by the wrongful act and omission of the railroad company. The railroad company, by the exercise of reasonable and ordinary care on its part, could have prevented the injury complained of. The death of Peter Plunkett was caused by the gross negligence of the railroad company. At the time of the injury complained of Peter Plunkett was in the exercise of reasonable and ordinary care. At the time of the injury complained of Peter Plunkett was not guilty of any negligence that proximately contributed thereto. As such brakeman or yard switchman, Peter Plunkett was under the control and direction of said yard-master of the railroad company. As such brakeman and yard switchman, it was in the line of Peter Plunkett's duty to couple and uncouple cars. The yard-master of the railroad company ordered and instructed Peter Plunkett to couple said cars just previous to receiving the injury complained of. At the time of the injury complained of Peter Plunkett was in the exercise of that degree of care that prudent men would ordinarily exercise under like circumstances.

"The findings of the jury, if we take their general conclusions, were substantially as claimed by the plaintiff, the defendant in error. Their general verdict, and all or nearly all of their general conclusions, whether of law or fact, were in favor of the plaintiff and against the defendant. And about the only findings of the jury which were favorable to the defendant were those findings which stated the facts in considerable detail. And even those findings which stated the facts in detail were fully as favorable to the plaintiff as the evidence would warrant; and indeed some of them were entirely too favorable." * * * [The court set out the principal findings of the jury tending to show liability or non-liability on the part of the defendant.]

Continuing, the court said: "The court below refused to submit the following, among other questions, to the jury, to wit:

"Q. 15. Was not the said car on which he was riding proceeding at a slow rate of speed, and of the speed of the ordinary walk of a man, and sufficiently slow to permit the said Plunkett to climb on the south side of the car, and to then walk along with it, and when it arrived where another car was standing, for him to then walk in front of said car, and to then bend down, and stoop his body in order to make the coupling between the cars on which he rode, and the one standing on the track?"

"This was not refused because of its leading form, but because the court below did not regard it as a proper question to be submitted to the jury. We think the court below erred. We know of no good

reason why it should not have been submitted. It embodies questions of fact material to the case, and was based upon the evidence. It is generally error for the trial court to refuse to submit to the jury questions of fact, material to the case, and based upon the evidence." * * *

The court then said: "We shall consider all the other questions together. And the main question is this: In what consisted the negligence (if any there was) which caused the death of Peter Plunkett? If the defendant was guilty of negligence at all, it must have been in ordering and permitting (through its yard-master, Joseph A. Russell) the deceased to attempt to couple said cars. And if the deceased was guilty of any contributory negligence it must have been either in not properly observing the manner in which the cars were loaded, or in not stooping a little lower in attempting to make the coupling. It cannot be said that the defendant was guilty of negligence (that is culpable negligence) in receiving the cars, for the mere reception of them could not by any possibility have injured any one. If the cars had been immediately unloaded, or if for any cause no attempt had been made to couple them, the accident would not and could not have happened. It is not claimed that there was any negligence except in the respects above mentioned; that is, in the defendant receiving the cars and in ordering and permitting the deceased to couple them, and in the deceased not observing how the cars were loaded, or in not stooping low enough to avoid the danger. It is admitted that the deceased knew the condition of the weather, the condition of the ground, the condition of the track, the condition of the cars (not including the manner in which they were loaded), and the manner in which the cars were to be coupled, as well as the defendant or any of its other servants or agents did; and hence if the defendant was guilty of negligence in any of these respects, the deceased must also have been guilty of negligence in at least as high a degree as the defendant, and therefore in either case, that is, whether there was any negligence or not in any of these respects, the plaintiff cannot recover. The deceased knew that it was raining, and knew that he was to couple the cars without an engine being attached to either of them, and no complaint is made of anything else by the plaintiff, except the manner in which the cars were loaded. The brakes were in good condition, and the deceased might have stopped the cars at any point. Indeed, the deceased was master of the situation. Almost every act (if not every one) that directly contributed to bring about the injury was the sole act of the deceased. He uncoupled from the engine the two cars which were to be coupled to the third car; and after the two cars were thus uncoupled from the engine (which engine was behind these two cars), the engineer by means of the engine gave the two cars a slight

push forward and eastwardly, starting them toward the third car, to which they were to be coupled. This was the last act, performed by any person except the deceased, which in any manner or degree contributed to the last sad and mournful result. At this place the track was slightly descending, and the two cars moved forward by their own weight and the momentum given them by the push of the engine. The engine did not follow them. While the cars were thus in motion, the deceased passed along on the south side of them, to the front end of them, and climbed upon the front end of the forward car and stood there near the brake and rode there until he nearly reached the third car, when he jumped off the car on which he was riding, on the south side thereof, and passed around in front of it and between it and the third car, for the purpose of coupling the two cars together. He made the attempt to couple them, and in doing so stooped down for the purpose of avoiding all danger from the projecting timbers. But he did not stoop quite low enough. If he had stooped six inches lower, and probably less, he would have been perfectly safe, but he miscalculated, and the projecting timbers struck the back part of his head and crushed it so badly that he soon died.

"We do not think that the defendant was guilty of negligence in ordering the deceased to couple the cars, or that the deceased was in attempting to couple them; and this whether the parties knew the exact condition of the cars or not. Cars in the condition in which these cars were could easily be coupled in safety, provided the person coupling them knew their condition and exercised proper care and skill. These very cars, while in the same condition, and only two or three hours after the accident occurred, were coupled together in safety by the defendant's other brakeman, and by yard switchman O. C. Nichols. And during the time that the deceased was in the employ of the defendant, cars in the same condition in which these cars were frequently received by the defendant and coupled and uncoupled in safety. Even the deceased himself had previously and frequently coupled and uncoupled such cars. But if it was negligence for the defendant to order the deceased to couple said cars in the condition they were, then it was also negligence for the deceased to attempt to couple them in that condition, provided he knew their exact condition; and if the deceased was negligent in this respect, then of course the plaintiff cannot recover. And we think the deceased must have known the condition of the cars. Indeed, he could not well have avoided knowing their condition, if he kept his eyes open and used them. And his actions in stooping as he did, in attempting to make the coupling, would indicate that he knew how the cars were loaded. The circumstances proved on the trial of the case would seem to indicate more strongly that the

deceased knew how the cars were loaded, than they do that any other servant or agent of the defendant knew the same; and still it seems to be admitted that the defendant, through its servants and agents, did know how the cars were loaded. The forty-third finding of the jury, heretofore quoted, states that the deceased knew the condition of the cars, and how they were loaded. But for the purposes of the case, we may suppose that the deceased did not in fact know at any time how the cars were loaded, and still it does not follow that the defendant was guilty of negligence in ordering the deceased to couple the cars. It was not the first time that cars had been received in the yard loaded in the manner in which these cars were loaded. It was not the first time that the deceased had been called upon to couple such cars. And he was not called upon in this instance to couple them in the dark. But cars had been frequently received in the yard loaded as these cars were loaded; and the deceased had frequently coupled such cars; and he was called upon in this instance to couple the cars in broad daylight. The only thing that might even be suggested as being in the way, was, that it was raining; but there is no pretense that the rain obstructed the vision of any one to any considerable extent. The defendant had a right to believe that the deceased would use his eyes, and his best judgment; that he would exercise all proper care and caution and skill, and that he would couple the cars in safety. He had previously had much experience in these matters. The defendant could not have anticipated that the deceased would fail to see how the cars were loaded; it could not have anticipated that he would fail to use proper care and skill and caution in coupling them; and it could not have anticipated that he would fail to couple them, or that he would be injured in attempting to do so. If this had been the first time that cars had been received in the yard loaded in the manner in which these cars were loaded, or if the deceased had been a new man in the yard, or inexperienced; or if it had been in the *night-time* that the coupling was to be done, as was the case in *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 32, 14 Am. Neg. Cas. 663n, it might then and probably would have been negligence for the defendant to order the deceased to make the coupling, without first explaining to him the condition of the loads and all the dangers connected with the act of making such a coupling. And even then, after making such explanations, it might still have been negligence if the deceased had been inexperienced and if the defendant knew it.

"In connection with this case we would refer to the following cases as having some application: *Flannagan v. Chicago & N. W. R. R. Co.*, 50 Wis. 462, 7 N. W. 337, and also a decision of the same case, 45 Wis. 98; *Hughes v. Winona, etc., R'y Co.*, 27 Minn. 137; *Kroy v. Chicago, R. I. & P. R. R. Co.*, 32 Iowa, 357, 14 Am Neg.

Cas. 603; *Penn. v. Hankey*, 93 Ill. 580, 14 Am. Neg. Cas. 342; *Williams v. A. T. & S. F. R. Co.*, 22 Kan. 117, 120 (1).

"The court below gave the following among other instructions to the jury:

"Although Peter Plunkett may have been guilty of misconduct or negligence which contributed remotely to the injury, yet if the misconduct, mismanagement or negligence of the defendant, its agents or employees, was the immediate cause of the injury, and if with the exercise of reasonable prudence and care on the part of defendant the injury might have been prevented, then it, the defendant, would be still liable for the injury."

"This instruction was misleading and erroneous. If the deceased, Peter Plunkett, was guilty of negligence at all, his negligence was clearly and necessarily direct and proximate, and not remote or far removed from the injury. It was certainly as near to the injury as was that of the defendant. His negligence, if he was negligent at all, was in not observing the manner in which the cars were loaded, or in not stooping quite low enough in attempting to make the coupling; while the defendant's negligence, if the defendant was negligent at all, was in ordering and permitting the deceased to make the coupling. Indeed, the court in other instructions seems to have placed the negligence of the defendant further back even than we have placed it. The court speaks of "the prior negligence of the defendant," and would seem to place this prior negligence as far back as the reception of the cars.

"We think the court below also erred in refusing to give certain instructions asked for by the defendant. These instructions asked for, though in various forms, were, in substance, that if the deceased knew all the circumstances, and with his eyes open attempted voluntarily to make the coupling, or if, in other words (and these words are ours), he was guilty of negligence proximately contributing to

1. *Railroad employee injured while loading cars on track—Pleading—Company not liable.*—In *WILLIAMS v. ATCHISON, TOPEKA & SANTA FE R. R. Co.*, 22 Kan. 117 (January Term, 1879), plaintiff, a common laborer employed in loading flat-cars and pushing the cars onto a side track, slipping on track, and injured by the car wheels of the hind truck passing over his left hand, judgment on demurrer was affirmed. The Supreme Court said: "Where a railroad company is sued by one of its employees for injuries received by him while in the

service of the company, and on the trial of the case no negligence is shown to have existed on the part of either the railroad company or any of its employees other than the plaintiff, we would think that the plaintiff could not recover, and that the court might rightfully and properly sustain a demurrer interposed by the defendant to the plaintiff's evidence, and that the court might then rightfully and properly render judgment in favor of defendant and against the plaintiff for costs."

the injury, the plaintiff could not recover. The court refused these instructions as asked, but gave them, adding these words: "*Unless the prior negligence of the defendant unnecessarily created the danger*, or unless by reason of the negligence of the defendant, and while the deceased was in the exercise of ordinary care, he received the injuries complained of." In one instance, where the instruction asked for contained the word "negligence," without any qualifying words, the court added the following words: "If such negligence of the deceased proximately contributed to the injury complained of."

"The court refused to give other instructions which we think might also have properly been given," * * *

Judgment reversed, all the justices concurring. (ROSS BURNS, A. A. HURD, and W. C. CAMPBELL, appeared for plaintiff in error; EVEREST & WAGGENER, for defendant in error.)

The points decided in the PLUNKETT case, *supra*, are stated in the official syllabus as follows:

"1. In an action against a railroad company for damages for negligently causing the death of one of its employees, it is not error for the court on the trial to exclude evidence offered by the railroad company to prove certain written or printed rules, which it claims the deceased wrongfully disregarded, when it is not shown that the deceased ever had any knowledge of such written or printed rules.

"2. And in such an action the Supreme Court cannot say that the trial court, when submitting the case finally to the jury, committed material error by submitting to the jury such general questions as the following:

["10.] Was the death of said P. caused by the wrongful act or omission of the defendant?

["11.] Could the defendant, by the exercise of reasonable and ordinary care on its part, have prevented the injury complained of?

["12.] Was the death of P. caused by the gross negligence of the defendant?

["13.] At the time of the injury complained of, was P. in the exercise of reasonable and ordinary care?

["14.] At the time of the injury complained of, was P. guilty of any negligence that proximately contributed thereto?"

"Where such general questions as the above are submitted to the jury along with numerous specific questions, and the jury make findings in answer to both the general and the specific questions, then if it can be seen that the general findings are mere conclusions drawn by the jury from the facts found and stated in the answers to the specific questions, the general findings may then be wholly ignored and disregarded, whether they agree with or contradict the specific findings.

"3. It is generally error for the trial court to refuse to submit to the jury questions of fact material to the case and based upon the evidence.

"4. Where a railroad company is in the habit of receiving from other railroads cars loaded with timbers which project over the ends of the cars so as to make it dangerous for any one except a careful, skillful and prudent person to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time.

"5. It is misleading and erroneous for the court to instruct the jury that negligence remotely contributing to the injury is not material, when in fact, if there was any negligence at all, it was clearly direct and proximate, and not remote or far removed from the injury."

BRAKEMAN KILLED WHILE COUPLING FREIGHT CARS—RAILROAD COMPANY LIABLE.—In **MISSOURI PACIFIC R'Y CO. v. BARBER**, Adm'x, 44 Kan. 612 (*July Term, 1890*), minor employee, a brakeman in defendant's service, killed while coupling freight cars, judgment for plaintiff in the Morris District Court for \$4,000 was *affirmed*. The opinion by SIMPSON, C., states the facts as follows:

"The deceased was a young man about nineteen years old, contributing to the support of his mother, and employed as a brakeman on the train of the defendant railroad company. He was killed at Emporia, early in the morning, while in the act of coupling two freight cars. One of these cars was the ordinary freight car in use on that road, with a single deadwood bumper; the other was a Pennsylvania Central freight car, having double deadwood bumpers—one on each side of the draw-head. The standing car was the Missouri Pacific one; the Pennsylvania Central car being the moving one. The brake-beam of the moving car was out of repair, swinging loose in such a manner that when the cars struck together it swung entirely out of its place and struck the deceased (who was endeavoring to make a difficult coupling) on the legs, knocked him down onto the track, lacerated and injured one of his limbs, by stripping off the flesh to the bone from near the ankle to the knee, held him fast, and caused his death.

"It is said by counsel for plaintiff in error that there is no evidence that tends to show that the death was caused by the brake-beam. The only witness who was standing in a position to clearly see, so states. He was an employee of the railroad company; he is illiterate

and unskilled in expressions, but his story is a well-connected narrative, and consistent in every respect; and in addition to this, the defective condition of the brake-beam is established by other evidence. The railroad company offered no evidence. The injury resulting in the death of the young man is not attempted to be accounted for on any other theory. The fact of injury, resulting in death, occurring at the time the deceased was engaged in making the coupling of these particular cars, is established beyond question. The defective condition of the brake-beam is fairly well proven, and this supports the story of the eye-witness, and makes it consistent with all the attending circumstances. Under the stress of these facts, the jury could not have come to any other conclusion but that the death was occasioned by the defective brake-beam." * * *

The official syllabus in the *BARBER* case, *supra*, states the points decided as follows:

"1. In an action brought under § 422 of the code by the administratrix of an intestate, whose death it is alleged was caused by the wrongful act of a railroad company, to make the petition sufficient in that respect it is only necessary to allege that the deceased left surviving him, as next of kin, the plaintiff, who was his mother.

"2. It is the duty of a railroad company to inspect a freight car, and to see that it is reasonably fit for service, before it is received from another company; and in the event that a freight car is received with a brake-beam in such a defective condition that a brakeman, whose duty it is to couple the foreign car with those used by the company receiving it, is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of such brake-beam, and its condition cannot be readily seen, the company that employs him and received such car in a defective condition is liable for such injury."

BRAKEMAN INJURED COUPLING CARS — EVIDENCE NOT JUSTIFYING FINDING OF NEGLIGENCE. — In *ATCH-ISON, TOPEKA & SANTA FE R. R. CO. v. CARRUTHERS*, 56 Kan. 309 (*January Term, 1896*), judgment for plaintiff in the Johnson District Court for \$10,960 was *reversed*. The facts of the case are as follows: Carruthers was in the service of the railroad company as head brakeman on a freight train on the line of railroad between Kansas City, Mo., and Fort Madison, Iowa. Late in the afternoon of the day of the accident a freight train was made up in the yards at Marceline, Mo., to be taken out by Lee Burgess as conductor, Carruthers as head brakeman, and a rear brakeman, and Carruthers was directed by J. C. Hutchinson, acting yardmaster, and Lee Burgess, conductor, to have the engine brought out and coupled to the train, and told that there was a car to cut out, but the train would

be ready by the time he got around with the engine. The conductor was busy taking the seals of some cars. Carruthers had the engine brought out and backed to the front end of the train consisting of about twenty-four cars besides the caboose. The front car, to which the tender of the engine was to be attached, was a stock car equipped with a Janney coupler. A straight link was held in this coupler by a pin, and when the engineer backed in response to the direction of Carruthers, it was found that the link was too low to couple to the tender, and Carruthers directed the engineer to pull up, which he did, having about eighteen inches space between the drawheads of the tender and the stock car. Carruthers went in between to take out the straight link so that it might be replaced with a crooked one, which was necessary to make the coupling; but for some reason not explained the pin stuck fast, and he attempted to loosen it by shaking the link, and while he held the link with his right hand and the head of the pin with his left, the stock car was jostled and propelled forward, and his right hand was caught between the Janney coupler and the drawhead of the tender, and it was so badly injured that it became necessary to amputate the same about two inches above the wrist joint. * * * It was *held* that the acting yardmaster and the conductor, whether treated as fellow-servants of plaintiff or as vice-principals of defendant, were not justly chargeable with negligence proximately contributing to plaintiff's injury. *Held*, also, that the jury was not justified in finding the defendant negligent in failing to provide a system of signals where there was no evidence to show that such a system would be feasible or useful.

BRAKEMAN FATALLY INJURED IN COLLISION OF FREIGHT ENGINE WITH LOADED CARS — FELLOW-SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — PRACTICE — RAILROAD LIABLE. — In **MISSOURI PACIFIC RY CO. v. McCALLY**, Adm'r, 41 Kan. 639 (*January Term, 1889*), brakeman fatally injured while in the performance of his duties, the case and points decided are stated in the official syllabus as follows:

"1. In an action against a railroad company to recover damages for personal injuries to a brakeman, occasioned by the negligence of a co-employee, it is unnecessary for the plaintiff to aver that there was no fault or negligence on the part of the injured person. Contributory negligence is a matter of defense. *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 582, cited and followed (1).

"2. In such an action, when a brakeman was engaged in the duties

1. The Phillibert case referred to as plaintiffs' stock while on the railroad being followed was an action against track.
the railroad company for injuries to

of switching and coupling cars ahead of an ordinary freight engine, that was being used for switching purposes, in one of the yards of the company, a switch engine never having been prepared for use in that yard; and having made a coupling ahead of the engine to a box car (another brakeman being placed on the box car), and as the engine moved forward to some loaded coal cars ahead, took a position on the platform to which the pilot is attached, immediately in front of the boiler head and behind the pilot beam, and the engine was driven with such speed against the loaded coal cars as to inflict injuries that caused his death, the questions as to whether that position was one of danger, and voluntarily chosen by the deceased, and whether it was the usual custom of all brakemen in that yard, and in all other yards on that road, to ride on the pilot, are questions of fact to be determined by the jury under all the circumstances. It is only when it clearly appears and the facts are undisputed that the injured employee has voluntarily chosen a dangerous position, a safer one having been provided by the company, that the court can say as a matter of law that the selection was such contributory negligence as would defeat a recovery.

"3. After trial the plaintiff asked, and was permitted by the court, to amend his petition so as to make it conform to the facts proved. This order of amendment is equivalent to a finding of fact by the court; and the judgment will not be reversed by this court, because it is apparently against the weight of the evidence produced at the trial; there is some evidence to sustain it, and it cannot be disturbed on error."

The McCALLY case, *supra*, was tried in the Franklin District Court, where judgment was rendered for plaintiff for \$3,000, which the Supreme Court *affirmed*.

Motion for rehearing in the McCALLY case was overruled. See 41 Kan. 655.

BRAKEMAN INJURED BY OBJECT NEAR TRACK—RAILROAD COMPANY LIABLE.—In **SOUTHERN KANSAS RY CO. v. MICHAELS**, 57 Kan. 474 (*July Term, 1896*), brakeman injured while in the performance of his duties, judgment for plaintiff in the Sumner District Court for \$6,860 was *affirmed*, the facts of the case being stated in the opinion by JOHNSTON, J., as follows:

"O. P. Michaels brought this action against the Southern Kansas Railway Company to recover for personal injuries received while acting as head brakeman on a freight train running from Cherry Vale to Wellington. The distance between the points was more than 100 miles, and Longton was among the stations on the route. A branch road connected with the line at that point, and there were a number of sidetracks and switches in the yards. Michaels was an

experienced brakeman. He was employed by the company in that capacity in October, 1885, and continued in its service until May, 1886. He re-entered the employment of the company in February, 1887, and was employed on the run mentioned until April 7, 1887. While engaged in switching in the Longton yards on that day he was hanging to the ladder on the side of a car, with his foot in the stirrup; and while signaling to the rear brakeman was struck on the back, knocked down, and severely injured by a switch-target, which is alleged to have been too close to the track. The switch-stand was midway between two tracks, and the center of the same was only four feet and three inches from the inside rail of either track. It was about seven feet high, and on top there projected about seventeen inches from the staff as a spear or arrow-head used to indicate the direction in which the switch was turned. The cars of the company projected about twenty-five inches over the rail, and when the seventeen-inch spear was turned it would leave a space of about nine inches between the switch-target and the side of the car. It is customary and proper for the brakeman to hold to the ladder on the side of the car while switching about the yards; and at the time of the injury Michaels was engaged in the performance of his duty, and was giving directions to the rear brakeman with reference to a switch on another track which required adjustment. The train was moving west, while the brakeman with whom Michaels was communicating was east of him; and therefore his back was toward the switch-stand, the target of which knocked him off. He was familiar with the yards, and had previously used the switch-stand; but he states that he had never observed that it was so close to the track as to make it dangerous for those who were upon the side of cars passing over the track.

"There have been two trials of the case, and in each Michaels has been successful in obtaining a verdict. The first judgment was reversed on account of error committed in the admission of testimony, and because the findings of the jury were unsupported by the testimony and inconsistent with each other. *Southern Kan. R'y Co. v. Michaels*, 49 Kan. 388. In the second trial he recovered a judgment for \$6,860; and the company brings the case here again, insisting that prejudicial errors were committed in the course of the trial." * * *

The points decided are set out in the official syllabus of the case as follows:

"1. The placing and maintenance of a switch-stand on the top of which there is an arrow or spear seventeen inches long and which, when turned toward the track, is so close as to knock trainmen from the ladder on the side of the cars when engaged in the performance of their duties, is negligence on the part of the railroad company;

and under the circumstances of this case warranted the submission to the jury of the question whether or not it was a case of gross negligence.

"2. While a trainman ordinarily cannot recover for injuries arising from perils that are obvious, yet the mere fact that the switchman had seen and handled the switch does not necessarily show that he had such information as would charge him with knowledge of the dangerous proximity of the same when the spear on the top of the switch was turned toward the track, and is not conclusive evidence of contributory negligence.

"3. The court may, in the exercise of a sound judicial discretion, require a plaintiff seeking to recover for personal injuries to submit to a physical examination; but where the application is not made until after the close of plaintiff's evidence, and no reason is shown for the delay in making the application, nor any showing made as to the necessity for such an examination, it will not be error to refuse the application.

"4. The refusal of a motion to require the court to strike out all the testimony of a witness, the greater part of which is unobjectionable, cannot be regarded as error.

"5. An error in the instructions which the findings of the jury show to be immaterial, is not ground for reversal.

"6. The testimony examined, and held to be sufficient to sustain the findings and verdict." (A. A. HURD, O. J. WOOD, and W. LITTLEFIELD, appeared for plaintiff in error; JAMES A. RAY, and J. E. HALSELL, for defendant in error.)

See also *SOUTHERN KANSAS RY CO. v. MICHAELS*, 49 Kan. 388 (July Term, 1892); head brakeman injured by contact with switchstand too close to railroad track; judgment for plaintiff *reversed* for erroneous rulings, inconsistent findings, etc.

**BRAKEMAN THROWN FROM TOP OF COAL CAR—
DEFECTIVE LOADING OF CAR—FELLOW-SERVANT—
RAILROAD COMPANY LIABLE.**—In *ATCHISON, TOPEKA &
SANTA FE R. R. CO. v. SEELEY*, 54 Kan. 21 (July Term, 1894), brakeman on construction train thrown from top of coal car, run over and leg injured, caused by defective loading of car, judgment for plaintiff was *affirmed*. The case is stated in the official syllabus as follows: "A construction train was operating in Missouri, carrying supplies along the line of the railroad. An open car was loaded with coal at a station, and upon the top of the load two smokestacks were loosely placed, subject to be shaken off by a jerk resulting from the starting or stopping of the train. The duty of loading such car devolved upon the station agent, and not upon the trainmen; and it was the duty of the yardmaster, and in his absence

that of the station agent, to see that open cars were properly inspected and prepared to be put into the train for transportation. When the train reached the station, a brakeman was directed to hurry and couple the car ahead of the engine, so as to get out of the way of a coming train, and was then directed to hurry and get upon the front end of the car, and keep a lookout upon the track in the direction they were going, the car being pushed ahead of the engine to a siding a short distance away. In this position, and looking forward, his back was toward the loose smokestacks on top of the coal. While he was occupying this place, the engineer carelessly applied the air brake, checking the speed of the train, and jerking the coal car so that the loose smokestacks pushed forward, and struck the brakeman upon the body, throwing him down under the wheels of the car, whereby he was badly injured. There was testimony that he had no knowledge or opportunity to know of the dangerous condition of the car. Upon a trial the jury found that the injury resulted from the negligence of the company, and not from any want of care on the part of the brakeman. *Held*, that it was the duty of the company to properly prepare and inspect the car before it was turned over to the trainmen for transportation; and those who did prepare and inspect the same were not in the same grade of service with the trainmen, and they did not stand as to each other in the relation of fellow-servants; and further, that the company is liable for the negligence and resulting injury." Opinion by JOHNSTON, J. On the trial in the Johnson District Court the jury found that Seeley was entitled to recover the aggregate amount of \$7,493.25, which was made up from three items: \$350 for loss of time from April 2, 1889, to November 1, 1889; \$700 for the pain and bodily suffering endured since that date by reason of his injury; and \$6,893.25 for the permanent disability, including interest from April 2, 1889. (A. A. HURD, ROBERT DUNLAP, and W. LITTLEFIELD, appeared for plaintiff in error; A. SMITH DEVENNEY, for defendant in error.)

In the SEELEY case, *supra*, the opinion by JOHNSTON, J., discusses the fellow-servant question and cites several cases, among them being *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 644, and 31 Kan. 197; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; *St. Louis & S. F. R'y Co. v. Weaver*, 35 Kan. 420; *Mo. Pac. R'y Co. v. Dwyer*, 36 Kan. 58; *Long v. R'y Co.*, 65 Mo. 225; *Condon v. R'y Co.*, 78 Mo. 567; *Mo. Pac. R'y Co. v. Barber*, 44 Kan. 612; and *R. R. Co. v. Baugh*, 149 U. S. 368, in which the Supreme Court of the United States fully indorses the doctrine of *Atchison, Topeka & Santa Fe R. R. Co. v. Moore*, 29 Kan. 632, and quotes largely from that opinion as to the relation of master and servant, and the doctrine of fellow-servants.

The Kansas cases cited in the preceding paragraph are reported with the Kansas cases in this volume of AM. NEG. CAS.

BRAKEMAN TURNING SWITCH INJURED ON DEFECTIVE TRACK — FAILURE TO GIVE WARNING OF DANGEROUS CONDITION — RAILROAD LIABLE. — In **KANSAS CITY, FORT SCOTT & GULF R. R. CO. v. KIER**, 41 Kan. 661 (*January Term, 1889*), brakeman injured, the points decided are stated in the official syllabus as follows:

“ 1. A railroad company is liable to any one of its employees operating its road for the negligence of either one of its officers or employees, whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give notice or warning thereof.

“ 2. It was the duty of the plaintiff, a brakeman, when his train was backing out of the station, to take a position on the platform of the car nearest the main line, and when he neared the switch to step off and adjust the switch and connect the main line. While performing this duty he received injuries in the following manner: The ground on the west side of the switch on the morning of the injury was level and hard, and had been in that condition for a long time; he passed the station going east at 8:21 in the morning, and returned to the station after dark at 6:37 in the evening; after his trip down on the road and a short time before his return, the railroad company caused several carloads of cinders to be unloaded in and about the switch for ballast; they were thrown up in heaps and piles on either side of the track, and not properly smoothed down, and were so thrown that the ground upon either side of the track was raised to a height of several inches, and left soft and spongy. According to his usual practice, the plaintiff, without any notice or knowledge of the changed and unsafe condition of the track, or road-bed, stepped from the moving train for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, thereby crushing and mangling his left foot to such an extent that amputation was necessary. *Held*, that in the absence of contributory negligence upon his part, the plaintiff was entitled to recover against the railroad company.

“ 3. Where a railroad company establishes rules concerning the duties of conductors and others in opening and adjusting switches along its road, and notifies the officers, conductors and other employees thereof, such rules must govern until abrogated or changed; but if a brakeman, under the directions of the conductor of his train and in the presence and with the knowledge of the division superintendent of the road, who has charge of its management and directs the employees of the company in the performance of their duties, opens and adjusts the switch for a long time in a different manner than prescribed by the established rules, such rules are

deemed changed or modified as to the brakeman obeying the orders of his conductor, with the knowledge and sanction of the division superintendent.

"4. Upon the testimony introduced in the case, the court did not err in submitting to the jury the question of the contributory negligence of the plaintiff; and as the jury, by their verdict, found upon this question in favor of the plaintiff, this court cannot, upon the evidence, which is greatly conflicting, as a matter of law declare that the plaintiff was guilty of contributory negligence that would defeat his right of recovery."

The KIER case, *supra*, was tried in the Montgomery District Court. There was judgment for plaintiff for \$7,000 damages and \$350.85 costs, which judgment was *affirmed* by the Supreme Court.

On motion for rehearing in the KIER case the court thought the judgment excessive, and if plaintiff would remit \$2,000 thereof the judgment for \$5,000 would be affirmed, otherwise the judgment of the District Court would be reversed. See 41 Kan. 671.

TRAIN RUNNING INTO WASHOUT—BRAKEMAN INJURED—LAW OF MASTER AND SERVANT IN ITS APPLICATION TO RAILROAD COMPANIES—FELLOW-SERVANT RULE—ERRONEOUS INSTRUCTIONS.—In **ATCHISON, TOPEKA & SANTA FE R. R. CO. v. MOORE**, 29 Kan. 632 (*January Term, 1883*), brakeman injured by train running into a "washout," judgment for plaintiff for \$8,000 on verdict rendered in the Wyandotte District Court was *reversed* for erroneous instructions. VALENTINE, J., delivered the opinion by the Supreme Court, discussing fully the statutory and common-law liability of railroad companies towards its employees. GEO. R. PECK and A. A. HURD, appeared for plaintiff in error (the railroad company); THOS. P. FENLON, for defendant in error. The case and points decided are stated in the official syllabus as follows:

"1. The plaintiff brought an action in the State of Kansas against a railroad company for injuries received in the State of Texas, while acting as a brakeman for the defendant, which injuries, he alleged, were caused by the negligence of the defendant and its officers, servants, and employees. In Kansas a railroad company is liable to each of its servants and employees for injuries caused by the negligence of any other of its servants or employees; but in Texas, where it was shown that the rule of the common law prevails, a railroad company which has exercised due care and diligence in employing and retaining only competent and trustworthy servants and employees, and in obtaining and keeping in a reasonably safe condition all necessary and proper machinery, implements and appliances for the particular work, is not liable for injuries to any one of its servants

or employees caused by the negligence of any other of its servants or employees, where they are all mere fellow-servants or co-employees together; but is liable only for its own negligence, or for the negligence of some one of its officers, agents, servants or employees who amounts in dignity and grade to a vice-principal, or a substituted master for the particular work which he is called upon to perform. The trial court in this case refused to give an instruction to the jury, in substance that under the laws of Texas the defendant was not liable to the plaintiff for injuries caused by the neglect of a co-employee or fellow-servant; and charged, in substance, that the defendant was liable to the plaintiff for any injuries caused by the negligence of the defendant *or its servants*, as charged in the plaintiff's petition. The question as to whether the defendant was liable at all or not under the facts of the case was, and is at least, very doubtful; but the jury found that the defendant was liable. *Held*, that the laws of Texas, with respect to the defendant's liability, govern in the present case; and *further held*, that the instructions of the trial court with reference to liability were, under the circumstances of this case, likely to mislead the jury, and were therefore erroneous; and that a new trial must be granted because of such errors.

" 2. In all cases, at common law, a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment, or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any of his servants for the acts or negligence of any mere fellow-servant or co-employee of such servant, where the fellow-servant or co-employee does not sustain this representative relation to the master; nor is he liable for the failure of still other servants to perform certain acts, where the performance of such acts does not

come within the proper line of their duties. Applying these principles to railroad companies and to the present case, it is *held*, that a railroad company would be liable to any of its servants operating its road, for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty or to give proper warning; for, in such a case, the two classes of servants would not be fellow-servants, or co-employees, but the latter class would really be the representative of the master, the railroad company, and the failure of the servant would be within the line of his duties. But a railroad company, at common law, and in Texas (if it has in other respects performed its duty), is not liable to its servants for the negligence of their co-employees, or fellow-servants, or for the failure of still other servants to perform certain acts, where the performance of such acts does not come within the proper line of their duties."

The MOORE case, *supra*, is frequently cited and followed in its rulings on the relation of master and servant and the fellow-servant question, and is largely quoted in the opinion of the Supreme Court of the United States in the case of *R. R. Co. v. Baugh*, 149 U. S. 368.

A subsequent trial of the MOORE case resulted in verdict and judgment for plaintiff for \$10,000, which was *affirmed* by the Supreme Court. See *ATCHISON, TOPEKA & SANTA FE R. R. Co v. MOORE*, 31 Kan. 197 (*January Term, 1884*).

EMPLOYEE INJURED WHILE UNDER ENGINE CLEANING ASH-PAN — DEFECTIVE APPLIANCE — RAILROAD COMPANY LIABLE. — In *ATCHISON, TOPEKA & SANTA FE R. R. CO. v. HOLT*, 29 Kan. 149 (*January Term, 1883*), railroad employee injured, judgment for \$4,800 for plaintiff in the Wyandotte District Court was *affirmed*. The facts of the case are sufficiently stated in the fifth paragraph of the syllabus to the official report, as follows:

"Plaintiff was employed by a railroad company operating its road in Kansas and the territory of New Mexico, as engine wiper or cleaner, at its round-house at Las Vegas, in New Mexico; one A. was in charge of the round-house and yards; one C. was the foreman at the place; one E. was also an engine wiper or cleaner, and worked with plaintiff. While the plaintiff was at the round-house C. ordered him and E. to go and clean an engine which was over the pit; plaintiff and E. started to obey the order, and went from the round-house to the engine; E. got upon the engine to shake down the fire and clean the fire-box; plaintiff got under the engine into the pit to clean the ash-pan; while he was standing in the ash-pit, leaning forward and supporting himself with his right hand resting on the rail, and hoeing the ashes with a short hoe in his left hand,

the engine moved automatically backward about three feet by reason of the steam escaping from the unsafe and defective throttle-valve of the engine; one driver of the engine passed over his fingers, mutilating and injuring them so that three had to be amputated. The jury found from the evidence that the engine was dangerous and unsafe for use; that the officers of the company and the person in charge of the engine did not exercise ordinary care and prudence to know the condition of the engine on the day of the injury, or at any reasonable time prior thereto; that the engine had been unsafe and dangerous for some considerable time before the day of the injury; that this fact could have been known to the company by the exercise of ordinary care; that the injury to the plaintiff was caused by the use of the defective and dangerous engine; that he was not aware the engine was defective when ordered under it, or while under it; that he was injured in consequence of the engine moving upon his hand; that he was obeying orders and performing his duty when injured; that he would not have been injured if the engine had not been defective and dangerous; and that he did not contribute by any negligence of his own to the injury. *Held*, the plaintiff was entitled to recover."

ST. LOUIS, FORT SCOTT AND WICHITA RAILROAD COMPANY v. IRWIN.

Supreme Court, Kansas, July Term, 1887.

[Reported in 37 Kan. 701.]

- RAILROAD TRACK AND BRIDGES.—1. It is the duty of a railroad company to so construct its tracks and bridges as will make them safe for its employees to perform their duties; and a party entering its service has a right to assume that this obligation has been discharged.
2. ASSUMPTION OF RISKS—KNOWLEDGE OF DEFECTS.—When an employee enters the service of a company he assumes all ordinary hazards incident to such service, and also other perils of which he had knowledge; but the conductor of a train is not required to know of all defects and obstructions that may exist on the road over which he runs.
3. DEFECT—NOTICE.—In an action by a conductor of a freight train for injuries received while in the service of a company, it was shown that while engaged in the performance of duty on the top of a car, and while the train was passing through a bridge, he collided with the overhead timbers, some of the braces of which were not sufficiently high to clear a man's head when standing erect on the top of an ordinary car, and thereby suffered the injuries complained of. *Held*, that the company having knowledge, and the conductor not knowing, nor having reasonable opportunity to know, of the defect, a liability arises against the company, and in favor of the conductor, for the injuries sustained.

4. ORDINARY CARE.—Although the conductor had passed over the bridge daily for three months, he stated that he did not know of the dangerous proximity of the braces to the top of the cars, to which position his duties seldom called him; that he had ridden on top of the cars only once prior to the accident; and it being shown that a person could stand on one part of the roof of a car with safety, while in standing on another part he would collide with the braces of the bridge; and it was further shown to be very difficult to determine with accuracy the distance between the top of the moving car and the overhead timbers of the bridge; *held*, that whether the conductor acted with ordinary care at the time of the injury was a proper question for the determination of the jury, and its finding that he did ought not to be disturbed.
5. MISCONDUCT OF COUNSEL.—To properly present the question of misconduct of counsel, in argument, to the Supreme Court, objections should be made to the alleged improper language, and a ruling had thereon by the trial court; and generally, when this is not done, no review of the question can be had.

(*Official syllabus.*)

ERROR from Sedgwick District Court. *Judgment affirmed.*

"Action against The St. Louis, Fort Scott & Wichita Railroad Company by W. H. Irwin, to recover damages for personal injuries suffered by him while serving the company in the capacity of a freight conductor. The plaintiff alleged that the company negligently constructed and provided a defective and unsuitable bridge upon its road, and that on December 6, 1884, while Irwin was on a freight train in the discharge of his duties, the train passed over and across the low and defective bridge, and although acting with due care and caution, he forcibly and violently came in contact with the overhead timbers composing the bridge, and was thereby violently thrown down from said train and was injured in his head, spine, body, and limbs, disabling him from performing any manual labor, causing him to linger in great bodily pain and mental anguish, and making him an invalid for life. The company answered, denying that it was negligent, and alleging that the injury was the result of his own carelessness and negligence. At the October Term, 1886, of the District Court of Sedgwick county, the cause was tried with a jury, which, in a general verdict, awarded the plaintiff \$12,000."

* * * The Railroad company moved to set aside the verdict, and for a new trial, on the grounds of irregularities on the part of the court and the jury during the trial; misconduct of the plaintiff and his counsel during the trial, and excessive damages, and that the verdict is not sustained by sufficient evidence and is contrary to law. The court overruled the motion,

and gave judgment in favor of Irwin for the sum of \$12,000. Exceptions were taken to the rulings of the court on the motion and in the rendition of judgment. The Railroad company brings the case to this court for review.

J. H. RICHARDS and HARRIS, HARRIS & VERMILION, for plaintiff in error.

HOUSTON & BENTLEY, for defendant in error.

Johnston, J.—It is earnestly contended by the plaintiff in error that the evidence is insufficient to sustain the finding that the railroad company was negligent in the construction and maintenance of the bridge which occasioned the injury; and that even if the company was negligent, the testimony shows that at the time of the accident Irwin was not exercising that prudence and care which was required of him, and hence ought not to recover. The testimony shows that the bridge in question is built over the Walnut river, about one-half mile from the station at El Dorado. It was so constructed that the top beams were sufficiently high to permit a person standing on the center of the top of a box-car or caboose to pass through without colliding with these timbers, but there were braces, extending from the posts of the bridge to the top beams, which were only about four feet above the outer edge of the top of such cars. A person of ordinary height standing in the center of a car could pass through the bridge with safety, but was in danger of being swept from the cars if he stepped a foot or two from the center. Irwin was the conductor of a freight train, and was standing on the top of the caboose, at the side of the cupola, when he was struck by one of these overhead braces. The brace was so low that it struck him below the shoulders, and, according to the testimony of one witness, it was only three feet and nine inches above the outer edge of the roof of the caboose. It was the duty of the railroad company to use ordinary care in providing tracks and bridges that would be reasonably safe for its employees in discharging the duties they were called on to perform. Brakemen and conductors of freight trains are frequently required to be on the top of the cars, both night and day. The hazards of such positions are great, and the duty of the company required that its employees should not be subjected to unnecessary perils from structures over and along the track which, by proper diligence on the part of the company, might be changed or removed. The necessity for a contrivance as dangerous as the overhead struc-

ture of this bridge was is not apparent. Indeed, it seems to have been otherwise planned, but was botched in the construction. E. S. Farnsworth, a witness for the company, and the engineer who furnished the plan for the bridge, stated that it was intended to be a standard Howe truss bridge in every particular, and that it was constructed of the usual height and width, and that the braces were a necessary part of the bridge, and that it was customary to put them in bridges in the same position and place as they were placed in the bridge at El Dorado. However, he stated that if the bridge was built according to the plans, he could not conceive how an employee on the caboose of a train could be struck by one of these braces, and he further stated that it would be more than six feet from the outer top edge of an ordinary caboose to the braces in the bridge. F. W. Tanner, the general foreman of bridges for the railroad company, testified that he had had fifteen years' experience in building and constructing railroad bridges. He was asked: "Could these braces in a bridge, properly constructed with due regard to the safety of employees, be low enough to strike a man of ordinary size on top of a car of ordinary height and width?" He answered: "They should not, providing the car was on the track and passing through the bridge as it should do." James Standard, an assistant superintendent of bridges for the railroad company, of nineteen years' experience in the building and construction of railroad bridges, stated that a railroad bridge should be so constructed that there would be no danger of a man striking the braces on any part of an ordinary car. This testimony would indicate that it was neither necessary nor intended in the first instance that the bridge should be so low as to be dangerous for employees to stand erect upon the top of any of the ordinary cars. It cannot be doubted that these facts were sufficient to go to the jury on the unsafe and unsuitable character of the bridge, and also sufficient to sustain the finding of the company's negligence in so constructing and maintaining it. With reference to such structures, Mr. Beach, in his work on Contributory Negligence, p. 364, says: "If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect on the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps."

The same question was before the Supreme Court of Indiana, where a brakeman was swept from the top of a freight train by a low bridge and severely injured. He had no knowledge that the bridge was low, or that it would interfere with the performance of his duty on top of the train while passing through. It was there urged that the defect, if any, was open and obvious, the dangerous character of which he had opportunity to ascertain, and the risk of which he assumed. The court ruled that it was the duty of the railroad company to construct and maintain its roadway and overhead structures in such a condition that an employee can perform all the duties required of him with reasonable safety; and as the bridge was insufficient in height, of which fact the employee had no knowledge, the injury was the result of the company's negligence, and for which the employee was entitled to recover. The court referred to the cases relied on by the railroad company in the present case, but refused to follow them. *Balt. & Ohio & C. R. Co. v. Rowan*, 104 Ind. 88, 14 Am. Neg. Cas. 494ⁿ.

Chicago & N. W. R. Co. v. Swett, 45 Ill. 197, 14 Am. Neg. Cas. 358, was an action to recover damages for causing the death of a fireman. The train on which he was working was precipitated through a bridge which was defectively constructed and maintained, and he was immediately killed. The court, in speaking of the duty of the company, and the peril which the employee assumed when he entered its service, said: "The peril consisted in the defective construction of the road and its appurtenances, its culverts and bridges, which the fireman could know nothing about, and which he could not have discovered by the exercise of ordinary precaution and prudence; indeed, he was not required to know anything about that; the implied undertaking of his employers that the road and culverts and bridges were properly constructed and safe for the passage of trains, was sufficient for him. He embarked in the service on the faith that it was a properly constructed road and that his superiors were in the exercise of all the diligence necessary to keep it in good repair. * * * There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road and sufficient and safe machinery and cars. For

their failure in this, and their employees not knowing the defects, and not contracting with express reference to them, the companies must be held liable for such injuries as their employees may suffer thereby."

The same doctrine was announced in *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183, 14 Am. Neg. Cas. 356ⁿ, where the plaintiff was injured while in the discharge of his duties as brakeman of a freight train by an awning projecting from a station-house to a dangerous position, and which knocked him from the top of a car while engaged in the discharge of his duty. It was held that this was such negligence as made the company liable for the damages sustained. *Chicago & Iowa R. Co. v. Russell*, 91 Ill. 298, 14 Am. Neg. Cas. 343ⁿ, was a case where a railroad company permitted a telegraph pole to stand for a period of three years so near to a side-track that it was within eighteen inches of passing freight trains, so that a brakeman in descending from the top of a freight car while in motion, in the performance of his duty, came in collision with the pole, and was thrown from the car and killed. It was held to be culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track. *Chicago & A. R. Co. v. Johnson*, 4 N. E. Rep. 381 (116 Ill. 206, 14 Am. Neg. Cas. 342ⁿ) was an action to recover for a personal injury suffered by a brakeman on a freight train while passing through a covered bridge. In affirming a judgment in favor of the brakeman, the court approved of an instruction to the effect that where a railroad company constructs a bridge along the line of its road, it should build it of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go upon the top of freight cars in discharging their duty as brakemen, while going through a bridge may pass through and under the bridge without danger to their personal safety; and that the law does not require of a brakeman that he should absolutely know all the defects of construction and all the obstructions there may be along the line of the road. In *Clark v. St. P. & S. C. R. Co.*, 28 Minn. 128 (1), a brakeman was killed by striking an awning which projected over a side-track in such a position that its lowest projection would strike a man of ordinary height on the head, while it would not come in contact with a man standing

1. The *Clark* case is reported with the Minnesota cases at the end of this volume of AM. NEG. CAS.

eight inches or a foot aside from the center of the car. The brakeman was struck by the corner of the awning while engaged in the performance of his duty in moving freight cars upon the side-track. The court held that the railroad company failed in its duty to the brakeman, and that if the brakeman had no knowledge of the peril the company would be responsible for the injury. (See also *Greenleaf v. D. & S. C. R. Co.*, 33 Iowa, 52, 14 Am. Neg. Cas. 607; *Allen v. B. C. R. & N. R. Co.*, 57 Iowa, 623, 14 Am. Neg. Cas. 669ⁿ; *Dorsey v. Construction Co.*, 42 Wis. 583; *Walsh v. Oregon R'y Co.*, 10 Ore. 250; *H. & T. R'y Co. v. Oram*, 49 Tex. 342.) The doctrines of these authorities more clearly accord with our views than do some of those cited by the plaintiff in error. Most of the latter, however, were disposed of on the theory that the employee had actual knowledge of the peril which he encountered. In this case the jury have said, and not without testimony, that Irwin had no knowledge nor opportunity to know of the dangerous character of the bridge. It is true that he had run over the road and through the bridge daily for three months preceding the accident. He knew of the existence of the bridge, and that it was constructed with overhead timbers, but it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the caboose or cars. When he entered the service of the company he assumed the ordinary risks incident to the service; and if he enters or continues in the service with a knowledge of the risk or danger, and without objection, he must abide the consequences. *Jackson v. Kansas City, L. & S. K. R. Co.*, 31 Kan. 761; *Kansas Pacific R'y Co. v. Peavey*, 34 Kan. 472; *Rush v. Mo. Pac. R'y Co.*, 36 Kan. 129 (1). The law, however, does not require that an employee shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged; and it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty and placed its track in such a condition that he could perform his duties with reasonable safety. The fact that a portion of the bridge was sufficiently high to clear a man's head while standing on top of a car, and other parts were not, made the bridge all the more deceptive and dangerous. Irwin, being a conductor, was not called to the top of

1. The *Jackson*, *Peavey* and *Rush* cases are reported with the Kansas cases in this volume of AM. NEG. CAS., pages 128, 26 and 112.

the train so frequently as brakemen were, and hence would be less likely to notice the lowness of the timbers in the bridge. He testified that he supposed the bridge was high so that it would be safe to stand on any part of the car. Several brakemen and others who passed through the bridge stated that they could not say from looking at the bridge that the braces were so low as to strike or injure one who was on top of a train. Men of experience say that it is a very difficult matter to tell exactly how high an object is above a moving train. The smoke of the engine, and the side or swaying motion of the cars, render it hard to see and comprehend the proximity of the overhead timbers of a bridge, and this is very well shown by the widely differing statements of the witnesses respecting the height of the braces in question. It does not appear that Irwin had been on top of the cars while passing through the bridge more than once before the time of the accident, and he says that he knows of no other bridge on the road with braces so low as they are in this one. The plaintiff had unloaded freight from his train at the station at El Dorado, and in accordance with the directions of the train-master had backed down half a mile in order to make a run over a high grade and over the crossing of the Atchison, Topeka & Santa Fe railroad, which was a few yards beyond the station. A train on that road was approaching the crossing, and Irwin sent one of his brakemen to flag the crossing, while he ran back over the cars of his train to the caboose. He remained on top of the caboose to watch the Santa Fe train in order to give the necessary signal and avoid a collision. It seems that on the previous day his train had almost collided with the Santa Fe train at the same crossing. It is said that Irwin might have required a brakeman to perform the duty on top of the caboose instead of going there himself; but it appears that his action in that respect was not outside of the scope of his duties. Under all the testimony, we cannot say that the danger was so open and obvious that Irwin knew or should have known of it; nor can we say that he was guilty of contributory negligence. Whether he acted with ordinary care is a mixed question of law and fact which was proper for the determination of the jury, taking into consideration all the facts and circumstances. The jury has passed upon the question on competent testimony, and we are unable to say that its finding is unwarranted. *Huddleston v. Lowell*, 106 Mass. 282; *Conroy v. Vulcan Iron*

Works, 62 Mo. 35; Dale v. R'y Co., 63 Mo. 455; Wood Master & Servant, §§ 376, 385, and cases heretofore cited.

Complaint is made of the ruling of the court in refusing several instructions requested by the plaintiff in error. The third was a declaration that the company would not be liable if Irwin could have protected himself by the use of ordinary care. The court stated this rule favorably enough for the company, where it instructed that:

"If the bridge in question was of sufficient height and width to enable employees, while in the discharge of their duties on top of freight and caboose cars in use at the time on defendant's road, to pass through it with safety by the use of ordinary care to protect themselves from injury, then defendant would not be liable for plaintiff's injury. The law does not require the defendant to furnish a bridge which the plaintiff could not be injured on, but is only required to furnish such a bridge as the plaintiff could pass through in safety, in the performance of his duties to the company, while exercising ordinary care for his personal safety."

The ninth request related to the knowledge of Irwin, holding that if he had knowledge of the bridge, or reasonable opportunity to know of its proximity to the top of the cars, he could not recover. The instruction as drawn was not exactly in harmony with the view we have taken, but the company has no cause to complain with respect to this rule, as the twentieth and twenty-second instructions given by the court stated that if he knew or had opportunity to inform himself of the condition of the bridge and the position of the braces, and their proximity to the top of the caboose, he could not recover; and further, that if he had a fair opportunity for acquiring a knowledge of the condition of the bridge and its danger while passing thereunder, if there was any, but ignored such knowledge or opportunity, and neglected to avail himself thereof, he cannot derive any advantage from such ignorance or want of knowledge, but his rights are to be determined the same as if he possessed the knowledge he might have acquired by the reasonable exercise of his faculties. The tenth request related to the duty of the company in the construction of the bridge, which duty was stated more fully and correctly in several instructions that were given. Objections are made to the twentieth and twenty-third instructions that were given. They relate to the rule fixing the liability of the company where

an employee has knowledge of the danger which he encounters. We do not think the criticisms of counsel are justified. But as the jury has expressly found that Irwin had no knowledge of the defect in the bridge, these instructions become unimportant.

We have examined the objections to the admission of evidence, and it is sufficient to say that we do not regard the rulings to have been prejudicial to the rights of the plaintiff in error.

One of the grounds for a new trial was the misconduct of counsel in his closing argument. The affidavits which were filed in the case show that the remarks of counsel were outside of the evidence, and were clearly improper. However, no objection to the remarks were made, except to the statement that Irwin would wait in misery and pain for the coming in of the jury, and that he hoped they would give more than the jury did before, to pay for the long trouble and the long work. The objection to this statement was promptly sustained by the court, and the attention of the court below was not called to any other of the objectionable statements. Of course the arguments should be confined to the facts brought out in the evidence, and it is error to allow counsel, over objections and exceptions, to discuss matters foreign to the evidence and prejudicial to the opposing party. But in exercising its appellate jurisdiction, this court is limited to the review of the alleged errors committed by the District Court; and generally speaking, the attention of the trial court should be called to the improper language of counsel, and a ruling had upon the objection, in order to present the question here. There being no exception to the ruling on an objection, nor any unsustained objection, we cannot say the court erred. *State v. McCool*, 34 Kan. 613, 617.

Some other objections were made, all of which have been examined, but we find nothing in the case that will justify a reversal, and hence the judgment of the District Court will be affirmed. All the justices concurred.

**FREIGHT CONDUCTOR FOUND DEAD ON TRACK—
DEMURRER TO EVIDENCE.**—In **CARRUTHERS, Adm'x v.
CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 55 Kan. 600 (*July
Term, 1895*), judgment sustaining demurrer to plaintiff's evidence
was affirmed. The case is thus stated by MARTIN, CH. J.:

"The only question argued in this case is whether the court erred or not in sustaining the demurrer of the defendant to the evidence introduced on the part of the plaintiff. That evidence shows that on or about January 10, 1889, John T. Carruthers was a freight conductor in the service of the defendant company; that he started from Horton southward with a train of about thirty-five cars bound for Herrington via North Topeka and Topeka; that his train stopped at the round-house in North Topeka, and also at the registering station some distance north of the railroad bridge spanning the Kaw river; that as the train started from there, between one and two o'clock in the morning, he got on somewhere in front of the caboose and then walked a distance forward on the tops of the cars; that, before the train got across to the south end of the bridge, he uttered a cry of distress, which was heard by a brakeman named Foley, in the cupola of the caboose, and who, getting down quickly, and looking out, saw that the wheels of the caboose were passing over a man, afterward ascertained to be the conductor; that the train was stopped, and he was found lying across the west or right-hand rail, his head outward and the lower part of his body and limbs between the rails, with the appearance of having been run over by several cars; that he was badly crushed about the hips, and died from his injuries in about an hour. It further appears that in the train were two flat cars loaded with telegraph poles, and next behind them and about the ninth car ahead of the caboose, a Missouri Pacific car of unusual height, being about two feet above the other box cars in the train, and called in the evidence a "hay car," which was coupled to the flat car next ahead of it with a long crooked link; that a short time after the injury, the train having been backed to North Topeka, another freight conductor named Sylvester climbed upon the top of said hay car for the purpose of giving a signal, and, when he descended at the south end on the west side, he found that the iron rod on the top of the car, used for a hand-hold in going up or down the ladder on the side, was loose and projecting outward at the south end the screw fastening that end of the iron rod to the wooden roof of the car, not being in its place either in the wood or the iron. Sylvester further testified that he noticed on the flange of the front wheel of the south end of the west side of the hay car a clot of blood, and a little piece of flesh about the size of the end of his thumb, and a little fuzz or piece of woollen cloth corresponding with the material in the coat and vest worn by Carruthers at the time. The tops of the cars were frosty and slippery that night. Three or four car inspectors are employed by the defendant at Horton, whose business it is to examine all cars going out to see if they are in good and safe condition, and as many more are kept at Topeka — with duties on both sides of the river — but there is no

evidence, unless this be such, whether the car was examined or not at Horton or North Topeka. It was usual for freight conductors, on leaving the North Topeka registering station, to go forward on the tops of the cars while crossing the bridge so they might get off and register at the Y on the south side of the river, and get on again, and thus avoid stopping the train entirely on a considerable curve. Nora M. Carruthers, the widow of said John T. Carruthers, was duly appointed as administratrix of his estate, and, having qualified, she sues in that capacity. The deceased left also a daughter surviving him.

"The plaintiff's theory of the disaster is that, when the ill-fated conductor reached the south or front end of the hay car he could not get to the flat next ahead, loaded with telegraph poles, without descending to the level of the platform; that, in doing so, he caught hold of the iron rod which was loose or defectively fastened and out of repair at its south end; that it gave way, and, by reason thereof, he fell and was run over. The blood, the small piece of flesh, and the fuzz on the flange of the wheel near the ladder are relied on as sufficiently indicating that the primary cause of the injury was the defective hand-hold. The position in which the conductor was afterward found and the nature of his injuries would render it more probable that he fell not only between the cars, but between the rails, for he was caught on the west rail nearly midway of his body. As it is a matter of common knowledge that freight cars extend out considerably beyond the rails, it would seem that he would not be likely to get under the wheels in falling from the side of this high car by the giving way of the hand-hold on its top, and therefore that this defect had no relation to the injury." * * *

The court cited numerous cases and affirmed the judgment. The decision is stated in the official syllabus as follows:

"In an action against a railway company to recover damages for the death of an employee, resulting from personal injuries, where the negligence alleged is the furnishing of a defective appliance in the use of which the employee was injured, it is necessary to allege and prove, among other things, that the defendant knew of the defect, or that it was of such a nature or had existed for such a length of time that, in the exercise of ordinary care, it should have been discovered by the defendant, in which case notice ought to be presumed; and where there is no evidence of such notice or its equivalent, a demurrer to the evidence is properly sustained." (GRANT W. HARRINGTON, F. M. WEBB and A. F. MARTIN, appeared for plaintiff in error; M. A. Low and W. F. EVANS, for defendant in error.)

**ST. LOUIS & SAN FRANCISCO RAILWAY CO.
V. WEAVER.**

Supreme Court, Kansas, July Term, 1886.

[Reported in 35 Kan. 412.]

- CASE—REMOVAL TO FEDERAL COURT.**—1. A case cannot be removed from a State court to the Federal courts under the Act of Congress of March 3, 1875, after a hearing has been had in the State court on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action.
2. **CONTRIBUTORY NEGLIGENCE.**—The jury found as a fact that the plaintiff was not guilty of contributory negligence. *Held*, that the Supreme Court cannot say from the evidence and as a matter of law that the finding of the jury is erroneous.
3. **BURDEN OF PROOF.**—The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant.
4. **NEGLIGENCE.**—The jury found as a fact, that the defendant was guilty of negligence in two or more particulars causing the injuries complained of. *Held*, that the Supreme Court cannot, under the evidence and as a matter of law, say that the finding of the jury is erroneous.
5. **SECTION BOSS AND ENGINEER NOT FELLOW-SERVANTS.**—A section foreman or section boss in the employment of a railroad company is not a co-employee or fellow servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence from liability for negligence between co-employees or fellow-servants.
- 6 **COMMON LAW — JUDICIAL NOTICE.**—The courts in this State may take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law, and for this purpose the courts of this State may take judicial notice of all the judicial decisions in this country and in all other countries which have adopted the common law of England; but for the purpose that the courts of this State shall know as a fact in a particular case what the common law of some other State is, such law must be proved as any other fact.
7. **COMMON LAW — PRESUMPTION.**—Where a cause of action involves as a question of fact what the common law of some other State is, it will be held that the common law of such other State is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and when it is shown by the evidence to be otherwise, it will govern as it is thus shown to be.
8. **COMMON-LAW LIABILITY OF MASTER.**—The question as to when a master at common law is liable and when not liable for negligence between co-employees, discussed.
9. **EVIDENCE—CONVERSATION BETWEEN CIVIL ENGINEER AND ROADMASTER—RES GESTÆ.**—Where the chief civil

engineer, having charge of the construction and repairs of a railroad, and the division roadmaster, having charge of a division of the road for the purpose of keeping it in proper condition and repair, had a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer, made in such conversation may be given in evidence as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division.

10. IMPEACHMENT OF PARTY'S OWN WITNESS.—The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet under the circumstances of the case the Supreme Court cannot say that any material error was committed.
11. EVIDENCE—REPAIRS AFTER ACCIDENT.—The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held*, that this evidence did not of itself prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but at most, it only tended to prove by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous.
12. DUTY OF RAILROAD COMPANY TO KEEP TRACK AND ROADWAY SAFE.—The law does not require that a railroad company shall, as between it and its employees, guarantee the sufficiency, good order and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition; and *held*, that the present case was tried upon such theory of the law.
13. REASONABLE CARE REQUIRED OF RAILROAD COMPANY TO MAKE ROAD SAFE.—A railroad company, as between it and its employees, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road or purchased it, or leased the same.

(*Official syllabus.*)

ERROR from Harvey District Court. *Judgment affirmed.*

ACTION brought by John W. Weaver against the St. Louis & San Francisco Railway Company, to recover damages for personal injuries. Trial at the January term, 1885, when the jury found for the plaintiff, and assessed his damages at \$10,000. In answer to special questions submitted to them, at the request of defendant, the jury made special findings of fact, as follows:

"1. What caused the plaintiff's injuries, complained of in his petition? A. Wreck.

"2. If you find that he was injured by a wreck on the defendant's road, state the cause of the wreck. A. Wash-out.

"3. If caused by a storm, state the nature thereof; whether it was of an unusual, violent and unprecedented character? A. An unusual rain, but not unprecedented.

"4. State whether or not a water-spout or tornado occurred that night in the valley above where the wreck occurred? A. No.

"5. Was the plaintiff injured as the result of his own negligence or of the defendant's negligence; or was it the result of both his negligence and that of the defendant? A. Defendant's.

"6. If you find that it was the result of the defendant's negligence, state in what the negligence consisted. A. Improper construction of water-ways, and negligence on part of section foreman.

"7. If you find that an unusual storm occurred in the valley above the wreck that night, did plaintiff know or have reason to believe before he reached the place where the wreck occurred, that such storm had prevailed? A. No.

"8. By what corporation or company was this railroad constructed? A. St. Louis, Arkansas & Texas.

"9. Did the company which constructed the road at the place where plaintiff was injured, use due care and diligence in the construction of the same? A. No.

"10. Who was the chief engineer and person who had charge of the construction of the road at the place where the accident occurred? A. Dun.

"11. Was the chief engineer who had charge of the construction of said road a skillful, competent and prudent man for the work in which he engaged? A. Yes, but liable to mistakes.

"12. If you find that the road was not properly constructed, state in what particular? A. Insufficient water-ways.

"13. Were the water-ways and water-gaps which were placed in the road at the time of its construction of sufficient capacity to carry off the water that fell in an ordinary and usual storm in that country? A. Yes.

"14. Was the road properly constructed at the place where the wreck occurred? A. No.

"15. If you find that it was not properly constructed, state

in what particular it was defectively constructed? A. Insufficient water-ways.

" 16. State whether or not the water-ways and water-gaps were of sufficient capacity to carry off all the water which the company had reasonable ground to believe would fall in that valley during any storm likely to occur? A. No.

" 17. Did the men engaged in the construction of the road at the place of the accident exercise the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances? A. No.

" 18. If you find they did not, in what did their failure consist? A. In not providing a sufficient water-way.

" 19. From the time of Downing's employment to the time of the accident complained of, had the defendant company, or any of its officers, reason to believe that Downing was incompetent, unskillful, or unfit for the position which he held? A. No.

" 20. Did the defendant, at the time it employed J. R. Ward as division roadmaster, and up to the time of the accident, have reason to believe that he, Ward, was a competent, skillful and capable man for the position which he filled? A. Yes.

" 21. Was Samuel Lyman, at the time he was employed by the defendant company as general roadmaster, a competent, capable and skillful man for the position of general roadmaster? A. Yes.

" 22. Was the defendant company or any of its agents or employees guilty of negligence in the construction or maintenance of its road at the place of the wreck? A. Yes.

" 23. If you find that they were, what officers or servants were they, and in what did the negligence consist? A. Chief engineer; improper construction of the water-ways.

" 24. If you find that the road was imperfectly constructed, state whether the attention of the company, or its officers, or employees, was called or directed to the imperfect construction? A. Yes.

" 25. At what rate of speed was the plaintiff running his train when it came around the curve in sight of the point where the wreck occurred? A. Twelve to fourteen miles per hour.

" 26. Was the plaintiff, at the time of the wreck, running his engine at a greater rate of speed than fourteen miles per hour? A. No.

"27. If you find that the plaintiff's injuries were caused by the negligent act of the defendant, state specifically in what that act consisted? A. Improper construction of water-way, and failure of the section foreman to warn the trainmen of danger.

"28. Was Charles Downing and the plaintiff engaged in the same common enterprise at the time of the wreck, subject to the control and direction of the same general master, engaged in the same common employment or pursuit? A. No.

"29. If you find that the water-way at the place of the accident was deficient in dimensions, was the fact thereof equally within the knowledge of the plaintiff and defendant, and did the plaintiff have as good opportunity to discover the same as the defendant? A. No.

"30. In what amount was the plaintiff actually damaged by reason of the injury complained of in his petition? A. \$10,000.

"31. Were the water-ways in the valley at the place of the wreck of sufficient dimensions to carry off all the water which the defendant company, by the exercise of prudence and care, had reason to anticipate at the time of the construction of the road would fall in that valley? A. No.

"32. Would a water-gap fifty feet wide have carried off the water which came down the valley that night without running over the track? A. Don't know.

"33. Were the water-ways and water-gaps clear and unobstructed up to the time of the accident? A. Yes.

"34. Were the water-ways and gaps of the road at this point of sufficient capacity to carry off the water which came down the valley during the severest storms, from the time of the construction of the road to the time when the wreck occurred? A. No.

"35. Was G. W. Turner, the master-carpenter who superintended the construction and maintenance of the water-ways at the place of the wreck, a competent, skillful and careful man in his business, and did he in such construction and maintenance use due care and skill? A. Yes.

"36. If you find that he was or did not, state in what particular he was negligent. (Not answered.)

"37. Was —, the bridge inspector, whose duty it was to examine the water-ways at or near the place where the accident occurred, a careful and skillful man; and did he, in the exercise of his duty, use a degree of care commensurate thereto? A. No.

"38. If you find he did not, state what he failed to do that he should have done? A. Ordered the culvert enlarged.

"39. Did the defendant company use due and adequate care to safely maintain its roadbed, water-ways and bridges at the place where the accident occurred? A. No.

"40. If you find it did not, state wherein it failed, and what particular officer, agent or employe it was who caused such failure? A. Building improper bridges; chief engineer.

"41. Did the defendant company, at the time it employed Charles Downing, have reason to believe him a sober, industrious, skillful and competent man for the purposes of his employment? A. Yes.

"42. At what rate of speed did the plaintiff cross the bridge over Clear creek, about half a mile below where the wreck occurred? A. Between ten to fourteen miles.

"43. Did the plaintiff increase the rate of speed after passing Clear creek, before coming to the place of the wreck? A. Don't think he did.

"44. Some indications of hard weather had preceded plaintiff before reaching the place of the wreck; did plaintiff observe anything at Clear creek to indicate that there was high water along the road? A. Not dangerously high.

"45. What precautions, if any, did plaintiff take in running his train that night, after seeing the high water in Clear creek? A. Ordinary precaution.

"46. To what rate of speed, under the rules of the company, was plaintiff restricted in running over the bridge across Clear creek? A. Ten miles per hour.

"47. Under the rules of the company, was it the duty of the section foreman to pass over, or send men over the track ahead of freight trains, after a storm? A. Yes.

"48. What officer or employee of the railroad company had charge of keeping the track in repair where the injury occurred? A. Section foreman.

"49. Would a person, in the exercise of ordinary care and caution, such as would be exercised by a prudent man, have come up the valley in which the plaintiff was injured, under the conditions and circumstances that the plaintiff in this case did, after seeing the high water in Clear creek, without first either sending some one ahead or having reduced the rate of speed of the train, so as to have brought it entirely within his control? A. Yes.

"50. Was the water-gap at the place where the plaintiff was injured obstructed by flood-trash, grass, weeds, or otherwise, so as to prevent the free passage of water through the same prior to the storm on the night of the accident? A. No.

"51. Was not the water in Clear creek, when plaintiff crossed it, higher than he had ever seen it prior to that time? A. Yes."

Special findings of fact, in answer to special questions presented to the jury at the request of the plaintiff:

"1. Had plaintiff crossed the bridge over Clear creek about one-half mile before he came to the place where the train was wrecked? A. Yes.

"2. Did the plaintiff find the roadway and bridge at and near Clear creek in safe condition at the time he crossed the same? A. Yes.

"3. Did plaintiff know that the place where the wreck occurred was on a higher level than Clear creek? A. Yes.

"4. Was there anything in the condition of Clear creek, or in the indications of the storm between Clear creek and the place of the wreck which would cause the plaintiff to believe that the track or culverts and water-ways in the upper valley were in any manner unsafe? A. No.

"5. What was the plaintiff's age at the time of his injury? A. Thirty-six years.

"6. Had he at that time any other calling or occupation than that of locomotive engineer? A. No.

"7. Had plaintiff been a locomotive engineer for about fourteen years before his injury? A. Yes.

"8. Had plaintiff, as such engineer, earned and received from \$3.50 to \$4 per day for his services as such? A. Yes.

"9. Were the services of the plaintiff worth from \$3.50 to \$4 per day at the time of the injury? A. Yes.

"10. In time of high water in the valley where the wreck occurred, did the main channel of the creek overflow its banks? A. Yes.

"11. In case of overflow of the banks of the main channel of such creek, would a large part flow to the culvert, the washing out of which caused the injury to plaintiff? A. Yes.

"12. Could defendant have learned, by exercise of reasonable diligence, that the culvert at such place was insufficient in size to permit the free passage of water in time of high water or overflow? A. Yes.

"13. Could the section foreman, Downing, have gone from his section-house to the place of the wreck in twenty minutes and have discovered the wash-out? A. Yes.

"14. Was it the duty of such section foreman in time of heavy rain to inspect the road and report to trainmen and officers of the road any defects therein? A. Yes.

"15. Did the section foreman on that section negligently fail to go over said road during and after a severe storm which prevailed there at that time and give men on train notice thereof? A. Yes.

"16. Was the road in question completed in August, 1881? A. Yes."

The court rendered judgment for the plaintiff and against the defendant for the amount of the verdict, with costs. To reverse this judgment the railway company brings the case to this court. The facts appear in the opinion.

JOHN O'DAY, for plaintiff in error.

JACKSON & ROYSE and BOWMAN & BUCHER, for defendant in error.

Valentine, J.—This was an action brought in the District Court of Harvey county, by John W. Weaver against the St. Louis & San Francisco Railway Company, to recover for personal injuries alleged to have been caused by the negligence of the defendant and its employees. A trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, and assessed the damages at \$10,000, and also made sixty-seven special findings of fact; and upon this general verdict and these special findings of fact, the court below rendered judgment in favor of the plaintiff and against the defendant and for the amount of the verdict, with costs. To reverse this judgment the defendant brings the case to this court.

The alleged injuries occurred on May 19, 1883, at about three o'clock in the morning, at a point on the defendant's railway where the same crosses Vernon valley, about four miles north of Fayetteville, Washington county, Arkansas. The plaintiff at the time was a locomotive engineer in the employment of the defendant, and had charge of an engine drawing one of defendant's freight trains from Van Buren, Arkansas, northeasterly, to Rogers, in the same State. J. Workman was the fireman on the same train. James Dun was the defendant's chief civil engineer, and had the general charge of the construction and repairs of the defendant's railway. J. F. Hinckley was an assistant civil engineer under Dun. Samuel Lyman was the defendant's general roadmaster. John R. Ward was

the division roadmaster for that division, and Charles Downing was the section foreman for that section, which includes the place where the accident and the alleged injuries occurred. The injuries were caused by the engine's running into a wash-out at the southeast side of Vernon valley about 900 feet south of where the railway crosses the main channel or Vernon creek or Vernon branch. At the main channel of Vernon branch, a pile trestle, sixty feet wide and six feet high, was constructed for the water to pass through. At the place where the accident occurred, a wooden box-culvert, six feet wide and four or five feet high, was constructed for the purpose of draining some low ground, and possibly also of carrying off a portion of the water that might flow down Vernon valley during times of high water. The water at this place flowed from the east to the west, though the general course of the stream was from northeasterly to southwesterly, and except during times of wet weather no water passed through this culvert, but all passed through the pile trestle. At the time of the accident a large volume of water was flowing down Vernon valley, and the high water of that night had washed out the culvert. The plaintiff's engine ran into the place where the culvert had been washed out, turned to the left, and turned over on its side; and while it was turning the plaintiff jumped from the cab window, on the upper side, and into a swift current of water. This current carried him back to the engine, which was still in motion, and his left arm was caught between the driving-rods of the engine, and was so crushed as to require amputation above his elbow and near the shoulder; and this injury and the incidental and consequent injuries are the injuries of which the plaintiff now complains.

The first question involved in this case is, whether the court below had jurisdiction to try the case or not. The plaintiff in error, the defendant below, claims that the case was removed from the State District Court to the United States Circuit Court. It appears that the defendant was at the time of the accident, and still is, a corporation organized under the laws of the State of Missouri, but besides doing business in the State of Missouri, it then and still does business in both the States of Arkansas and Kansas. The plaintiff at the time of the accident was a resident of Arkansas. Afterwards, and before commencing this action, he removed to and became a resident of the State of Missouri, and while a resident of the

last-mentioned State he commenced this action in Kansas. He is still a resident of the State of Missouri. He commenced this action on December 17, 1883. On January 4, 1884, the defendant filed a general demurrer to the plaintiff's petition, upon the alleged ground that the petition did not "state facts sufficient to entitle the plaintiff to maintain his said action against the said defendant." On February 4, 1884, the demurrer was overruled. Afterward the defendant filed an answer, and also an amended answer, and the plaintiff replied thereto. Afterward, and on May 20, 1884, the defendant filed its petition and bond for a removal of the case to the Circuit Court of the United States; and afterward, and on October 13, 1884, filed its plea in abatement, claiming that the case had already been removed to the Circuit Court of the United States. Both the application for the removal and the plea in abatement were overruled.

Now, passing over all other questions with regard to removal, we think the defendant made its application for removal too late. It has been decided by the Supreme Court of the United States, in at least three cases, that a case cannot be removed from a State court to the Federal courts under the act of congress of March 3, 1875, after a hearing has been had in the State court on a demurrer to the complaint, because it did not state facts sufficient to constitute a cause of action. *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 U. S. 711; *Gregory v. Hartley*, 113 U. S. 742.

The next question is really one of fact; was the plaintiff guilty of contributory negligence? The distance from Van Buren to the place where the accident occurred is sixty-one miles, and to Rogers seventy-seven miles. When the plaintiff's train left Van Buren, which was on May 18, 1883, at 7:30 o'clock in the evening, it was raining slightly. When the train reached West Fork, a distance of about forty-five miles from Van Buren and sixteen miles south of where the accident occurred, there was still evidence of rain, but no evidence of any great storm. When the train crossed Clear creek, something over half a mile from where the accident occurred, the grade is ascending, and there was very little, if anything, to indicate danger until the train had approached very near to Vernon valley, where the accident occurred, and nothing to conclusively show danger until the engine commenced to turn to the left and to turn over, as aforesaid. This was all in the night-time, about three

o'clock in the morning. In Vernon valley, where the railroad crosses Vernon branch, or Vernon creek, there is a pile trestle about sixty feet wide and six feet high for the water of Vernon branch to run through; and this trestle is about 900 feet north from the culvert, or sluiceway, as it was sometimes called, where the accident occurred. The bed of Vernon creek is also a few feet higher than the bottom of this culvert or the ground where it was placed. It was not intended the Vernon branch or any portion of the stream itself should pass through this culvert, but the culvert was really intended to carry off only the water from some low ground adjacent thereto. But in constructing the railway, in putting in the pile trestle where the water of Vernon branch was to run through, and digging a ditch from that point on the east side of the railway to the point where the accident occurred, and throwing up an embankment of solid earth on which to place the railway track, the course of Vernon branch was so changed that during times of high water a large proportion of the water from the branch passed along the east side of the railway to the culvert and ran through the culvert and down a ravine to the main branch. Upon these facts we cannot say, as a matter of law, that the plaintiff was guilty of culpable contributory negligence. We have not stated the facts in the great detail in which they were proved, but, taking all of them just as they were proved, we cannot say, as a matter of law, that the plaintiff was guilty of any culpable contributory negligence; and, therefore, the findings of the jury, general and special, that the plaintiff was not guilty of such negligence, must be sustained.

It is claimed, however, that the burden of proof rests upon the plaintiff to show that he was not guilty of contributory negligence, and not upon the defendant to show that he was. The rule, however, in this State is otherwise. *Kansas Pacific R. Co. v. Pointer*, 14 Kan. 38, 50, 11 Am. Neg. Cas. 572; *Kansas City L. & S. R. Co. v. Phillibert*, 25 Kan. 583; see also *Beach on Contributory Neg.* 430, § 157. The law presumes that every person performs his duty; and this presumption continues until it is shown affirmatively that he does not or has not. Hence, wherever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty and is not guilty of any culpable negligence, contributory

or otherwise. Hence, while it may be said in a general sense that the burden of proving his case devolves upon the plaintiff, yet if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant; and this has been the uniform holding of this court.

The next general question is, whether it has been shown that the defendant was guilty of negligence. The question is principally one of fact. The principal negligence charged against the defendant in the present case is the failure of the defendant and its employees to put in a sufficient culvert at the place where the accident occurred to carry off all the water which naturally flowed to it in times of high water, or which was caused to flow to it by reason of the manner in which the railway was constructed at Vernon valley; and also the failure of the defendant and its servants or agents to exercise reasonable diligence to discover the "wash-out" and to give the plaintiff and the other trainmen proper warning of the danger before the accident occurred; and the principal agents of the defendant who are charged with negligence are the defendant's chief civil engineer and his assistants, and the section foreman of the section where the accident occurred and his assistants. We have already stated how the railway track, trestle, embankments, ditches, culverts, etc., were constructed at Vernon valley, so as to cause the principal portion of the water flowing down this valley during times of high water to flow down to this culvert, instead of passing through the pile trestle, through which it was intended that it should pass; and also the dimensions and capacity of the culvert. We would further state that the section foreman resided about three miles south of the place where the accident occurred, and had, at the place of his residence, assistants, hand-cars, lights, tools, torpedoes, signals, etc., and that he could have gone with a hand-car to the place where the accident occurred in about twenty minutes, and it was his duty to do so, but he did not. Taking all the facts and circumstances of this case together, we cannot say, as a matter of law, that the jury erred in finding, as a matter of fact, that the defendant was guilty of negligence in the respect aforesaid.

It is claimed, however, by the plaintiff in error, defendant below, that the section foreman was not a representative of the defendant as between the plaintiff and the defendant, but that the plaintiff and the section foreman were co-employees, mere fellow-servants of the same master, in a common line of employment; and therefore that under the common law, which is admitted to be in force in Arkansas, where the accident occurred, the defendant is not liable to the plaintiff for the negligence of the section foreman. There is nothing in this case, however, to show what the courts or others in Arkansas consider to be the rule of the common law in cases of this kind, and there is a great difference of opinion prevailing in this country upon this subject; hence we must decide this case upon our own views as to what the rule of the common law in such cases is. It may be that our view of what the common law is differs from that of the Supreme Court of Arkansas; but as it has not been proved in this case, as a matter of fact, what view the Supreme Court of Arkansas or the courts of that State take upon this question, it will be necessary, as before stated, for us to follow our own views as to what the common law upon this subject is. If it had been proved in the case what view the Supreme Court of Arkansas has taken with respect to the common law in cases of this kind, we would follow its view; and this we would do even if its view should differ from ours. If within its view the plaintiff has no cause of action, we would also hold that he has no cause of action. We have no disposition to encourage persons who have no cause of action in their own State to come to Kansas and sue in this State, with the possible intention of evading the laws of their own State, and because they may possibly believe that under the rules of law as administered in this State they might be allowed to recover, when they could not recover in their own State. Such would not be a proper administration of justice. If it be claimed, however, that we should take judicial notice of the common law of Arkansas, we would answer that we cannot do so. The courts of this State may take judicial notice of the common law of Kansas, and what it would be except for our own statutes or our own written law; and for this purpose our courts may take judicial notice of all the judicial decisions of this country and of all other countries which have adopted the common law of England. *Hunter v. Ferguson*, 13 Kan. 463, 475. 476; *Division of Howard Co.*, 15 Kan. 194, 213; *City of*

Topeka v. Gillett, 32 Kan. 431, 437. But for the purpose that the courts of this State shall know as a fact in a particular case what the common law of some other State is, such law must be proved like any other fact. *Porter v. Wells*, 6 Kan. 455; *Hunter v. Ferguson*, 13 Kan. 463. In Arkansas it is probable that a section foreman would be considered as a mere co-employee, and in the same line of employment with a person assisting in operating a railroad train for the same employer; but such is not the view taken by this court. In the case of the *Atch., Top. & S. F. R. Co. v. Moore*, 29 Kan. 633, 644, 15 Am. Neg. Cas. 57, *ante*; same case, 11 Am. & Eng. R. R. Cas. 243, 251, the section foreman, or section boss, as he is there called, is mentioned as a representative of the railroad company as between the railroad company and the trainmen; and in that case as there reported, and in a subsequent decision of the same case, reported in 31 Kan. 197, 15 Am. Neg. Cas. 59, *ante*, 15 Am. & Eng. R. R. Cas. 312, it was held that the roadmaster, as between a railroad company and the trainmen, is the representative of the company, and that the company is liable to such trainmen for the negligence of the roadmaster. See also note to last-mentioned case, 15 Am. & Eng. R. R. Cas. 315.

See also the following cases following in the same line: *Hann. & St. J. R. Co. v. Fox*, 31 Kan. 586; same case, 15 Am. & Eng. R. R. Cas. 325; *Atch., Top. & S. F. R. Co. v. Holt*, 29 Kan. 149; same case, 11 Am. & Eng. R. R. Cas. 206 (1). Also in the same line see the following cases: *Lewis v. St. L. & I. M. R. Co.*, 59 Mo. 495; *Dale v. St. Louis, K. C. & N. R. Co.*, 63 Mo. 455; *Hall v. M. P. R'y Co.*, 74 Mo. 293; *Vautrain v. St. Louis, I. M. & S. R'y Co.*, 8 Mo. App. 538; *Louis. & Nash. R. Co. v. Bowler*, 9 Heisk. 866; *Hardy v. N. C. C. R. Co.*, 74 N. C. 734; *Hardy v. C. C. R. Co.*, 76 N. C. 5; *Davis v. R. R. Co.*, 55 Vt. 84; same case, 11 Am. & Eng. R. R. Cas. 173; *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197, 14 Am. Neg. Cas. 358; *O'Donnell v. A. V. R. Co.*, 59 Pa. St. 239; *Cook v. St. Paul, M. & M. R'y Co.*, 24 N. W. Rep. 311; *Kelly v. E. T. & T. Co.*, 25 N. W. Rep. 706; *Copper v. Louisville, etc., R'y Co.*, 2 N. E. Rep. 749; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *H. & T. C. R'y Co. v. Dunham*, 49 Tex. 181; *Snow v. Housatonic R'y Co.*, 90 Mass. 441 (2); *Brickman v. S. C. R. Co.*,

1. The *Fox* and *Holt* cases are reported with the Kansas cases in this volume of AM. NEG. CAS., pp. 128 and 59.

2. The *Snow* case is reported with the Massachusetts cases in this volume of AM. NEG. CAS., page 417, *post*.

8 S. C. 173; *Colo. Cent. R. Co. v. Ogden*, 3 Colo. 499, 13 Am. Neg. Cas. 523; *Thayer v. St. L. A. & T. H. R. Co.*, 22 Ind. 26, 14 Am. Neg. Cas. 554ⁿ; *Indiana Car Co. v. Parker*, 100 Ind. 181, 14 Am. Neg. Cas. 422; *Atlas Engine Works v. Randall*, 100 Ind. 293, 14 Am. Neg. Cas. 438; *Central R. Co. v. Mitchell*, 63 Ga. 173, 14 Am. Neg. Cas. 128, 1 Am. & Eng. R. R. Cas. 145; *Hough v. R'y Co.*, 100 U. S. 213.

There are two classes of cases in which the employees of the same master are not such co-employees that one of such employees may not recover for injuries caused by the negligence of another employee while all are engaged in transacting some portion or portions of the common master's business. The first class is where the negligent employee is one who has the general management of or control over some portion or line of the master's business, and has control over the injured employee and the other employees engaged in that portion or line of business. A good illustration of this class is found in the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; same case, 17 Am. & Eng. R. R. Cas. 501. This is an extreme case, however, and is in conflict with the weight of authority in this country (1). See also, and as another illustration of this class of cases, the case of the *Louis. & Nash. R. Co. v. Bowler*, 9 Heisk. 866, where it was held that the section-boss and his subordinates were not fellow-servants with each other. This is another extreme case. These cases are not controlling in this case, however, even if they properly state the law; for, although the section foreman in this case hired, controlled and discharged his subordinates, yet the plaintiff was not one of his subordinates and did not work with him or

1. But see *New England R. R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182 (1899), where it was held that the negligence of the conductor of a freight train is not that of a vice-principal, but is that of a fellow-servant of a brakeman who was injured by such conductor's negligence, and the railroad company was not liable therefor. In the *Conroy* case, the Federal rule as to fellow-servants announced in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, *Balt. & Ohio R. Co. v. Baugh*, 149 U. S. 368, *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, and *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, is discussed at length, and the vagueness and uncertainty theretofore existing as to the rule by reason of the decisions cited disposed of, and the rule clearly stated. In the *Conroy* case, Mr. Justice Harlan dissented from the ruling of his brethren, and adhered to the judgment in which he concurred at the time of its being rendered, in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, holding that a conductor is a vice-principal.

under him. The other class of cases where the employees of the same master are not considered such co-employees that the master will be liable to one employee for the negligence of another employee, is where two or more sets of employees are engaged in different lines of employment; as, for instance, where one set of employees has charge of a railroad train and its operation, while the other set is to keep the road in proper condition and repair. Numerous cases illustrating this class of cases have already been given. [See cases cited in preceding paragraph.] It was said in the case of *Atchison, Top. & S. F. R. R. Co. v. Moore*, 29 Kan. 644, 15 Am. Neg. Cas. 57, *ante*, as follows:

"It [the railroad company] was simply bound, through certain of its employees — the roadmaster and section-boss for instance — to use reasonable and ordinary care and diligence to keep its road in proper condition; and such employees, with respect to those who operate the road, represent the company and indeed are the same as the company. In all cases, at common law, a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements, to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any duties above mentioned, which really devolves upon the master himself, then such officer, servant, agent, or employee stands in the place of the master and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence."

In the present case the roadmaster, the division roadmaster and the section foreman and his assistants were in one line of duty, while the trainmen were in another and a different line of duty, and each set within its own line of employment repre-

sented the master as to the other set; and the members of one set were not the mere fellow-servants with the members of the other set. The principal ground upon which the doctrine has been established, that the master is not liable for any negligence that might take place as between mere fellow-servants, is that such fellow-servants work together in the same line of employment, are intimately acquainted with each other, and knowing each other better than the master could possibly know any one of them, they take all risks of negligence on the part of their fellow-servants; that if any servant chooses to work with a known incompetent or negligent fellow-servant, without informing the master, he himself should take all the risks and consequences of his fellow-servant's negligence and incapacity, the master being required only to use reasonable and ordinary care and diligence in the original employment and the subsequent retention of only such servants as are competent and habitually careful. *Dow v. K. P. R'y Co.*, 8 Kan. 642, 646, 15 Am. Neg. Cas. 41, *ante*. But where employees work in different lines of employment, one having no means of knowing anything about the business or qualifications of the other, and being wholly unacquainted with the other, they cannot be said to be fellow-servants within the meaning of the foregoing rule; and this state of things fairly represents the condition of a railroad section foreman and an engineer on a freight train, and the relation existing between them. Therefore, where a railroad company delegates, directly or indirectly, to a section-boss or section-foreman the duty of keeping a certain section of the railroad in proper condition and repair, and to warn trainmen in case of danger, and the section-boss fails to perform his duty in these respects, and a trainman is injured by reason of such negligence, the railroad company is responsible.

It is claimed that the court committed error in the conduct of the trial of this case in many particulars. One of the first errors of this kind complained of is that the court admitted the testimony of J. R. Ward, the division roadmaster, with respect to statements made by James Dun, the defendant's chief civil engineer. These statements were made prior to the time of the occurrence of the accident, and were made while Ward was the division roadmaster for that division of the defendant's railway, and while Dun was the defendant's chief civil engineer. The statements of Dun were brought about in the following manner: Dun asked Ward if the heavy rains at any time had

given Ward any trouble at the place where the accident occurred, and Ward told him that they had never had any trouble there; and Ward then made the statements complained of. The testimony of Ward showing this, reads as follows: "He (Dun) asked me the question if the heavy rains at any time had given me any trouble there. I told him we had never had any trouble there with high water. He said that he had been uneasy about that place; that he had been detained there by high water when locating the road." At the time when the conversation occurred between Dun and Ward, it was the duty of Dun to see that the railway was properly constructed, and it was the duty of Ward to see that that division of the railway was in proper condition and repair; and this conversation was really a consultation, a conference concerning matters within the line of their duty, the conversation itself was within the line of their duty, and the declaration of Dun formed a part of the consultation—a part of the *res gestae*. The purpose of introducing this evidence was to show that the railway company had notice of the character and condition of its railway and of the danger at the place where the accident subsequently occurred; and as it was the duty of the chief engineer and the division roadmaster to see that the road was safe and in proper condition, notice to them was notice to the defendant. Authorities showing that the declarations of agents, not made while in the performance of the agent's duty nor forming any part of the *res gestae* have no application to this case. The following cases we think have application to this case: *Brehm v. C. W. R'y Co.*, 34 Barb. 257, 275; *Balt. & Ohio Rd. Co. v. State of Maryland*, 19 Am. & Eng. R. R. Cas. 83; *Louis., N. A. & C. R'y Co. v. Henley*, 88 Ind. 535, 539; same case, 12 Am. & Eng. R. R. Cas. 301-304; *Baldwin v. St. L., K. & M. R'y Co. (Iowa)*, 25 N. W. Rep. 918, 14 Am. Neg. Cas. 628, 629; *Locke v. S. C. & P. R. Co.*, 46 Iowa, 109; *M. D. T. Co. v. Leyson*, 89 Ill. 44; *Colo. Cent. R. Co. v. Ogden*, 3 Colo. 499, 13 Am. Neg. Cas. 523; *McGenness v. Adriatic Mills*, 116 Mass. 177; *National Bank v. Stewart*, 5 S. C. 845; *C. B. U. P. R. Co. v. Butman*, 22 Kan. 640, 642; *Kan. Pac. Ry. Co. v. Little*, 19 Kan. 267, 272. We cannot say that the court below erred in permitting the statements of Dun to be given to the jury.

It is further claimed by the defendant below, plaintiff in error, that the court below erred in permitting the plaintiff below to impeach one of his own witnesses. It is possible that

the court below committed a slight error in this respect, but still a matter of this kind is so largely within the sound judicial discretion of the trial court that we cannot say that any reversible error was committed in the present case. There was no attempt to impeach the witness generally, or to impeach his evidence generally, but the only attempt was to show that he had made a statement out of court, and by a letter to the plaintiff, which was different from his testimony upon a particular subject in court. The supposed error arose as follows: D. Workman was the fireman on the plaintiff's engine at the time the accident occurred. The plaintiff introduced him as a witness for the purpose of proving that the train was not moving at the time the accident occurred at a speed greater than from twelve to fourteen miles an hour, but he testifies that the train was moving at that time at the rate of from fifteen to eighteen miles an hour. The plaintiff, then, for the purpose of impeaching this testimony, introduced a letter from Workman to the plaintiff, in answer to a letter from the plaintiff to Workman, in which first-mentioned letter Workman stated that the train was moving at the time only at the rate of from twelve to fourteen miles an hour. The plaintiff had also taken the deposition of Workman, in which he testified that the train was moving only at the rate of from ten to fourteen miles an hour; but as Workman was present at the trial the plaintiff could not introduce the deposition as original evidence. If the court erred at all, it was not in requiring the plaintiff to show by stronger evidence than he did that the plaintiff was surprised at Workman's testimony. But taking all the testimony together, and the fact that this testimony is of but little importance in the case, we cannot say that the court below so abused its discretion or committed such material error in permitting the plaintiff to impeach his own witness, that the judgment of the court below must be reversed therefor.

The plaintiff in error, defendant below, also claims that the court below committed error in permitting the plaintiff to introduce evidence showing that the defendant, after the culvert was washed out, put in another culvert or bridge of greater dimensions, so as to permit a greater amount of water to pass through. The defendant can hardly claim that this was a material error, for the defendant also proved the same fact. And if error at all, it was a very slight and trifling one under

all the facts in the case. But was it error? The making of the passageway larger than it had formerly been was an admission, slight it may be, and of but little value, but still an admission, on the part of the defendant, that the passageway had previously been too small. And why might not the jury consider such evidence for what it was worth? Many authorities sustain the introduction of this kind of evidence. (*St. J. & D. C. R. Co. v. Chase*, 11 Kan. 47; *Atch., Top. & S. F. R. Co. v. Retford*, 18 Kan. 249; *City of Emporia v. Schmidling*, 33 Kan. 485; *W. C. & P. R. Co. v. McElwee*, 67 Pa. St. 311, 314; *K. P. R'y Co. v. Miller*, 2 Colo. 443, 468, 469; *O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 Minn. 279; *Kelley v. S. M. R'y Co.*, 28 Minn. 98; *Brehm v. C. W. R'y Co.*, 34 Barb. 256; *Westfall v. Erie R'y Co.*, 5 Hun, 75; *Sewall v. City of Cohoes*, 11 Hun, 626; *Harvey v. N. Y. C. & H. R. R. Co.*, 19 Hun, 556; *Readman v. Conway*, 126 Mass. 374.) It is evidence in the nature of an admission from conduct, and many illustrations of such kind of evidence might be given. It is frequently resorted to in criminal cases. The evidence of this change in the dimensions of the water-way does not of itself prove negligence; it does not prove that the railway company had notice of the insufficiency of the culvert prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence. It at most only tended to prove by way of admission and as a fact that the culvert was too small, and that the company obtained knowledge of the same, not before, but after the accident. Of course the change of any structure or appliance, to be of any value as evidence, must be made soon after the accident, and seemingly have some connection therewith. This is so held by some of the following authorities, while others of the following authorities hold that the evidence is wholly incompetent under all circumstances: *Salter v. D. & H. Canal Co.*, 3 Hun, 338; *Payne v. T. & B. R. Co.*, 9 Hun, 526; *Baird v. Daly*, 68 N. Y. 547; *Dale v. D., L. & W. R. Co.*, 73 N. Y. 468; *Morse v. M. & St. L. R'y Co.*, 30 Minn. 465; same case, 11 Am. & Eng. R. R. Cas. 168; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. C. & N. W. R. Co.*, 59 Iowa, 581. We do not think that the court below committed error in admitting the foregoing evidence.

We do not think that the court below committed material error, or any error, in refusing to permit evidence to be intro-

duced with regard to the speed-register. It was not sufficiently identified, nor was any sufficient preliminary evidence introduced to authorize its introduction. Neither do we think that any of the instructions to the jury were materially erroneous. If we should put the same construction upon some of the instructions given to the jury as the plaintiff in error, defendant below, does, we should have to hold them erroneous. The plaintiff in error claims that by some of the instructions a railway company is required to guarantee the sufficiency, good order and good condition of its track and roadway. Of course such is not the law. The law merely requires that railway companies shall exercise reasonable and ordinary care and diligence to keep their tracks and roadways in a reasonably safe condition. (Atch., Top. & S. F. R. Co. *v.* Wagner, 33 Kan. 660, 15 Am. Neg. Cas. 19, *ante*; same case, 21 Am. & Eng. R. R. Cas. 637; Atch. Top. & S. F. R. Co. *v.* Ledbetter, 34 Kan. 326, 15 Am. Neg. Cas. 134, *post*; same case, 21 Am. & Eng. R. R. Cas. 555.) But taking the entire charge of the court, it is evident that the court did not intend to instruct the jury as the plaintiff in error claims. On the contrary, we think the court intended to instruct the jury that the law is just as we have stated it to be. But even if the court had instructed the jury as the plaintiff in error claims, still, under the findings of the jury, the error would be immaterial; for the jury found that the injuries resulted not only from the negligence of the defendant below in the improper construction of the water-ways, but also in the negligent failure of the section foreman to pass over his section of the railway before the accident occurred, and to warn the trainmen of the danger; and as before stated, it is the opinion of this court that the railway company is responsible to the trainmen for the negligence of the section foreman. Neither do we think that it makes any difference that the defendant did not originally construct its railway. It is true of a great many railroad companies that they do not construct their own roads; but nevertheless, a railroad company must exercise reasonable and ordinary diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same.

Neither did the court commit any material error in refusing to give instructions. Some of the instructions asked for by the defendant and refused are not good law and proper in the case. Some of them were substantially given in the general

charge of the court, and some of them were rendered wholly immaterial by the special findings of the jury. All the material findings of the jury were sustained by sufficient evidence; and while we might agree with the plaintiff in error, defendant below, that the verdict of the jury is excessive, yet it is not sufficiently excessive to authorize a reversal of the judgment of the court below, when the trial seems otherwise to have been fair.

The judgment of the court below will be affirmed. JOHNSTON, J., concurred.

HORTON, CH. J.: I place my affirmance of the judgment of the District Court in this case upon the following grounds: The petition of Weaver alleges, among other things, that his injury was caused by the carelessness and negligence of the section foreman of the railway company in failing and neglecting to go over the railroad track after a heavy and severe storm which occurred along the road on the night of the 18th of May, 1883, to ascertain whether any damage had been done thereby to the roadbed, and for failing and neglecting to notify Weaver, and other employees of the railroad company upon the train with Weaver, of the wash-out, as it was his duty to do, and which, in the reasonable discharge of his duties, he should have done, and which, if so done, would have prevented the injury inflicted. The evidence shows that Charles Downing was the section foreman in charge of the roadbed where Weaver was injured. He had been in charge of his section from six to nine months. There was a severe rainstorm on the night that Weaver's engine was derailed, some of the witnesses stating that the rainfall was unprecedented. It commenced raining at Downing's section-house about five o'clock in the evening, and rained up to eleven or twelve o'clock — perhaps later. The storm ceased before two o'clock. The injury occurred about three o'clock in the morning. The roadbed where Weaver's engine was derailed was washed out for a great distance. The section-house where Downing, the section foreman stopped, was three or four miles from the wash-out. In the section-house the foreman and two section men slept, and at this house there was a hand-car, lanterns, torpedoes, signals and tools for inspecting and repairing the track and implements for giving signals to trains, etc. C. W. Rogers, the general superintendent of the railway company, testified that the general orders of his company in relation to section foreman going over the road

were that "they were to precede every passenger train, and in case of heavy or extraordinary storms, to go over the road carefully before any train." Among other rules upon the time-card of the railway company were the following:

"During the continuance, and after storms of rain, wind, or snow, section foremen will always be required to see that the track is not obstructed by fallen trees, driftwood, brush, stones, etc., and to precede each passenger train run in the night by sending two or three men over their section with their hand-cars and lights to see that the track is clear, and if necessary, notify trains of any obstruction or defect. This rule will be strictly enforced against section foremen."

"All persons employed upon the road must give timely notice of any obstruction to the passage of trains, by exhibiting a flag, etc., and must notify all passing trains."

The jury found, upon the evidence before them, that Downing had charge of keeping the track in repair where Weaver was injured; that he could have gone from his section-house to the place of the wreck in twenty minutes and discovered the wash-out; that it was his duty, in time of heavy rains, to inspect the road and report to the trainmen and officers of the road any defects therein; that he neglected and failed to go over the road during and after the severe storm which prevailed before the engine was derailed, and neglected and failed to give the men on the train notice of the wash-out. If Downing had performed his duty and gone over the road before the arrival of the train drawn by Weaver's engine, he would have had knowledge of the wash-out and could have put out danger signals so as to have stopped the train, and thereby prevented the wreck. The derailment of the engine, the wreck of the train, and the injury to Weaver, were caused by Downing's negligence. He, as the section foreman, did not bear the relation of fellow-servant or mere co-employee in the same line of employment with Weaver, the engineer. He represented the railway company, and the company is responsible to Weaver for the injuries which, through his negligence, were inflicted upon him. If a section foreman, under the decisions of Arkansas, where Weaver was injured, is regarded as a servant or co-employee in the same employment with the engineer operating an engine, such decisions should have been introduced in evidence, as stated in the above opinion. In the absence of any evidence of such a construction of the common

law by the Arkansas courts, this case must be disposed of upon the interpretation given in this State to the rule of the common law. The burden of proof that Weaver was guilty of contributory negligence was upon the railway company. Upon this question the findings and judgment were against the company. There is evidence to support these findings, and therefore it cannot be said that Weaver was guilty of negligence.

Engineer Killed in Collision — Pleading.

In *KANSAS PACIFIC R'Y CO. v. SALMON*, ADM'X, 11 Kan. 83 (*January Term, 1873*), judgment in the Leavenworth District Court for \$7,500 for plaintiff, whose intestate was killed in a collision was *reversed*, the grounds being stated in the official syllabus as follows:

"1. A person in the employment of a railway company, riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and the understanding of the parties, from which car and trains all persons except employees of the company are excluded, of which exclusion such person has full knowledge, is not a *passenger* but only an *employee* of the company.

"2. Negligence between co-employees of a railroad company is not, as between one of the employees and the company, negligence of the company.

"3. As between the company and one of the employees of the company, the mere naked and unexplained fact of a collision of two trains of cars operated by the same company raises no presumption of negligence on the part of the company."

A subsequent trial in the *SALMON* case resulted in verdict and judgment for plaintiff for \$9,600, which, on appeal was *affirmed*. Plaintiff's petition was amended in that it alleged that her intestate was an *employee*, a locomotive engineer of defendant company, whereas the former petition alleged that he was a *passenger*. See *KANSAS PACIFIC R'Y CO. v. SALMON*, ADM'X, 14 Kan. 512 (*January Term, 1875*).

Engineer Killed in Collision — Assumption of Risk — Instruction.

In *UNION PACIFIC R'Y CO. v. MONDEN*, ADM'X, 50 Kan. 539 (*January Term, 1893*), locomotive engineer killed in collision, judgment for plaintiff for \$9,000 was *reversed* for erroneous instructions, and failure to instruct on the question of assumption of risk, etc.

FIREMAN ON SWITCH ENGINE INJURED IN COLLISION — STATUTE — DAMAGES — RAILROAD COMPANY LIABLE. — In **MISSOURI PACIFIC RAILWAY CO. v. MACKEY**, 33 Kan. 298 (*January Term, 1885*), appeal from judgment for plaintiff for \$12,000 in the Atchison District Court, judgment for plaintiff was *affirmed*. The case is stated by JOHNSTON, J., as follows:

"This action was brought by Patrick Mackey against the Missouri Pacific Railway Company to recover for personal injuries sustained by him while employed by the defendant company as fireman upon a switch engine, and which injuries he alleges were occasioned solely by the gross carelessness and negligence of the employees of the railway company other than himself. Among the facts about which there is little, if any, dispute, may be stated the following: The railway company has control of two track yards, in and adjacent to the city of Atchison, commonly designated as the 'upper yard' and the 'lower yard,' and which are about one mile apart. On February 11, 1882, the defendant company was using and operating two switch engines with their crews in these yards and running and switching cars; the engine designated as No. 166 being chiefly used in the upper yard, and the other, known as No. 154, being principally used in the lower yard, although each engine also hauled and pushed cars from one yard to the other, and both engines and their crews were used in the common employment of the defendant. The plaintiff was serving as fireman on engine No. 166. On the day the accident occurred, No. 154 started from the lower yard with from ten to fifteen loaded cars for the purpose of placing them upon the side tracks in the upper yard where engine No. 166 was at the same time employed in transferring cars from one point to another in the upper yard. About the time that No. 154, going westward, entered the upper yard, engine No. 166 was backing eastward, when the two engines collided, wrecking the engines, and crushing plaintiff's foot and leg so that it became necessary to amputate it, which was done on that day. The collision occurred on a bright, clear day, between eleven and twelve o'clock in the forenoon. The ground was level, and the track was straight for a distance of about a quarter of a mile east of the point of collision, and the engineer in charge of engine No. 154 could have seen engine No. 166 that distance, and he testifies that he did see engine No. 166 at work in the upper yard while he was approaching, and when he was 1,000 feet away, but he did not ring the bell, sound the whistle, or give any signal or warning of the approach of his engine, until he was within a few feet of engine No. 166, and only three or four seconds before his engine collided with the other. No danger signal or other warning was given of the approach of No. 154 by the engineer in control of No. 166.

No. 166, headed westward, had just pushed some cars west on the side track, and returning, backed down upon the main track, a distance of 400 or 500 feet to the point of collision. When No. 166 started to back down the plaintiff tapped the bell several times, looking west in the meantime for signals from one of the crew, when he got down and began to break and shovel coal into the engine; while thus engaged he was bent over with his back toward the east, and just as he completed this work and straightened up for the purpose of taking his seat, the collision occurred. The case has been twice tried in the District Court of Atchison county. At the first trial a verdict was rendered awarding the plaintiff \$11,000 in damages. This verdict was by the court set aside for error in the admission of testimony; and upon a second trial, occurring nearly a year afterward, a verdict was rendered in favor of the plaintiff for the sum of \$12,000. Numerous errors are assigned and discussed by counsel for defendant, which we will consider." * * *

The points decided are stated in the syllabus to the official report as follows:

"1. Chapter 93 of the Laws of 1874, which provides that railroad companies shall be liable for all damages to any of their employees, caused by the negligence of co-employees, does not deny to railroad companies the equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States, and is not in conflict therewith. *Mo. Pac. R'y Co. v. Haley*, 25 Kan. 35, 15 Am. Neg. Cas. 117; *Bucklew v. Central Iowa R'y Co.*, 64 Iowa, 603 (14 Am. Neg. Cas. 662n).

"2. The inquiry of what are the general duties of a fireman on a switch engine in a certain track yard at a stated time, does not relate to a matter which is the subject of expert testimony, and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof.

"3. While witnesses ought not to be permitted to express an opinion that a fireman upon an engine performed a certain service in the manner required of him in the proper discharge of his duty, yet it is competent for any witness having personal knowledge of the facts, to state what the duty is, or what services were generally performed by firemen in that yard.

"4. In an action against a railroad company by one of its employees, to recover for personal injury occasioned by the negligence of co-employees, the plaintiff is held only to the exercise of ordinary care to entitle him to recover — such care as men of ordinary judgment, intelligence and prudence would exercise under like circumstances; and an instruction that any negligence or slight negligence on the part of the plaintiff would prevent a recovery would imply

and hold the plaintiff to a higher degree of care than is by law required of him, and was properly refused.

"5. The evidence considered, and held to be sufficient to show that plaintiff's injury was caused by the negligence of his co-employees, and also to sustain the finding of the jury that plaintiff was in the exercise of ordinary care at the time he received his injury.

"6. An employee of a railroad company, thirty-nine years of age, in good health, who was serving in the capacity of fireman on a locomotive, had his leg and foot crushed, making amputation necessary, and causing great and protracted suffering, impairing his general health, and after a lapse of more than two years the injury occasions him considerable nervous irritation and pain, which will probably increase and continue during his lifetime, was by the jury awarded damages in the amount of \$12,000. *Held*, that under the circumstances, the verdict is not so excessive as to lead to a conclusion that the jury were actuated by passion, prejudice, or improper influences, nor to justify this court in setting the verdict aside."

The railway company in the *MACKEY* case, *supra*, took the case to the Supreme Court of the United States on the ground that the Kansas statute (Laws of Kansas, 1874, chapter 93, section 1, p. 143) was in conflict with the fourteenth amendment to the Constitution of the United States. The Supreme Court of the United States held that there was no such conflict. See *MO. PAC. R'Y CO. v. MACKEY*, 127 U. S. 205.

Fireman injured in collision — Foreign corporation.

In *HANNIBAL & ST. JOSEPH R. R. CO. v. KANALEY*, 39 Kan. 1 (January Term, 1888), fireman in defendant's employ injured in collision between two freight trains on a railroad bridge in Missouri, judgment for plaintiff for \$5,000 was *reversed* for several errors. Among the points decided were the following: An action may be brought against a railroad company, incorporated in another State, in the county of this State (Kansas) where it runs its trains and lands its passengers, for any injury to persons or property upon its road. (Civil Code, §§ 50, 68a.) Whether a railroad company has been guilty of negligence in the use of certain orders and signals for the movement of its trains, cannot be determined by proof that another railroad company has adopted a different order for the operation of its trains. Machinery to be reasonably safe, and reasonable care only required of railroad company towards employees. The railroad company was entitled to an instruction that the conductor had no right to disregard his orders and the directions conveyed to him by the signals, on account of the information he supposed he was receiving from the conductor of the moving train.

Fireman on "dummy" or motor engine injured in collision — Demurrer.

In *TELLE v. LEAVENWORTH RAPID TRANSIT R'y Co.*, 50 Kan. 455 (*January Term, 1893*), fireman injured in collision of engine with coal car, the engine being an ordinary street motor known as a "dummy," judgment for defendant on demurrer was *affirmed*. Presumption of negligence cannot be made against the master or a co-employee, without proof tending to support it.

SECTION FOREMAN INJURED — CAUSE OF ACTION BARRED BY STATUTE OF LIMITATIONS INGRAFTED UPON CASE NOT BARRED BY THE STATUTE — PRACTICE. — In *ATCHISON, TOPEKA & SANTA FE R. R. CO. v. SCHROEDER*, 56 Kan. 731 (*January Term, 1896*), it was held (as per official syllabus) that: "A plaintiff cannot deprive a defendant of the benefit of the statute of limitations by ingrafting upon a case commenced in time another cause of action barred by the statute. Accordingly, where Schroeder, a section foreman, commenced his action in due time against the railroad company to recover damages for personal injuries sustained in its service by the failure of the company to perform its common-law duties toward him, and more than two years after the injury he filed an amended petition containing an additional cause of action, namely, that the injury was the result of the negligence of a fellow-servant, for which the company would be liable only under chapter 93, Laws of 1874: *Held*, that the statute of limitations, as applied to such new cause of action, treats the action as commenced when the amendment was incorporated into the pleadings, and not as begun when the action itself was commenced, and that it was barred." Opinion by MARTIN, CH. J. Judgment for plaintiff in the Butler District Court for \$2,800 was *reversed*, and judgment entered in favor of the railway company.

In the *SCHROEDER* case, *supra*, the court cited the case of *ATCHISON, TOPEKA & SANTA FE R. R. CO. v. KING*, 31 Kan. 708, on the point that "an action to recover damages for personal injuries suffered by a servant of a railroad company from the negligence of a fellow-servant must be brought within two years."

On the point as to the *SCHROEDER* case, *supra*, being barred by the statute of limitations the court (per MARTIN, CH. J.) said: "This question has been recently decided by the Supreme Court of the United States in *Union Pacific R'y Co. v. Wyler*, 158 U. S. 285. Wyler, an employee of the railway company, was injured in its yards at Wyandotte in April, 1883. He commenced his action in the Circuit Court of Jackson county, Missouri, September 25, 1885, alleging that he was injured through the incompetency of Kline, a co-em-

ployee, and charging that such incompetency was well known to the railway company but unknown to the plaintiff. The petition, therefore, stated a cause of action at common law for the fault of the master. The case was removed to the United States Circuit Court and remained pending until October 30, 1888, when the plaintiff filed an amended petition, in which he reiterated his original averments and added thereto the charge that his injury resulted from the negligence and mismanagement of Kline. On November 2, 1888, he filed a second amended petition, which eliminated the charge of the incompetency of Kline and the knowledge of such incompetency on the part of the railway company, and further stated that he had "a cause of action against the defendant under and by virtue of the law of Kansas in such cases made and provided, in section 1, chapter 93, Laws of Kansas of 1874." The court decided that the statute of limitations, as applied to such new cause of action, treats the action as commenced when the amendment was incorporated into the pleadings, and not as begun when the action itself was commenced. The Missouri statute of limitations in such cases is five years, but more than that time had elapsed from the date of the injury in April, 1883, until October 30, 1888, when the cause of action under the statute was first set up. The court held the action to be barred, Justice White delivering the unanimous opinion of the court, which is very exhaustive, and to which we refer as containing a full citation and review of the authorities upon the subject both old and new."

SECTION HAND THROWN FROM DEFECTIVE HAND CAR — RAILROAD COMPANY LIABLE. — In **THE SOLOMON RAILROAD COMPANY v. JONES**, 34 Kan. 443 (*Kansas, July Term, 1885*), an appeal from judgment for plaintiff, Jackson S. Jones, in the Mitchell District Court, for \$5,750, judgment for plaintiff was affirmed. Plaintiff's petition was as follows:

"The said plaintiff complains of the Solomon Railroad Company, defendant herein, for that the said defendant being a railway corporation, organized under the laws of said State before and at the time of the committing of the grievances hereinafter mentioned, and then was the owner of a certain railroad running from Solomon City in said State to Beloit, therein, and was the owner of a certain hand-car used on the track of said railroad in propelling materials for, and men engaged in, the construction of and making repairs upon said track; that the said plaintiff on the 19th day of November, 1879, at Beloit aforesaid, at the time of the committing of the said grievances, was in the employment of the said defendant, as a workman, engaged in the construction of and making repairs upon said track; and that it then and there became and was the duty of the said

defendant to procure a good, safe and secure hand-car to move, propel and carry this plaintiff from place to place on the line of said railroad in the performance of his duty in and about said employment, and to propel and carry the tools and materials used by said plaintiff in the construction of and making repairs upon said track, yet the said defendant, not regarding its duty in that behalf, conducted itself so carelessly, negligently and unskillfully, that by and through the carelessness, negligence and default of the said defendant and its servants in providing, using and suffering to be used an unsafe, defective and insecure hand-car, for the purposes aforesaid, and for want of due care and attention to its duty in that behalf on the 19th day of November, 1879, aforesaid, and whilst the said hand-car was in the use and service of the said defendant upon said railroad and whilst the said plaintiff was on the same, acting in the capacity and employment aforesaid, for the said defendant, the handle of said hand-car, by reason of the unsafeness, defectiveness and insecurity thereof, broke, whereby this plaintiff was thrown violently therefrom and in front thereof, while the said hand-car was in motion, and the same passed over the prostrate body of this plaintiff, greatly injuring and wounding him, breaking one of his legs and greatly injuring the other, as well as bruising and injuring him in the back, hips, and in divers places upon his body, and in consequence thereof this plaintiff became sick and permanently disabled, and has so remained ever since that day, and was put to great expense in and about endeavoring to cure said injuries, and also during all that time was unable and still is unable to perform any work or labor of any kind, and has been ever since and still is prevented from attending to his ordinary business, and has been and now is thereby permanently deprived of the use of his members to his great damage, to wit, to the damage of said plaintiff in the sum of ten thousand dollars. Wherefore, he prays judgment against the said defendant for the sum of ten thousand dollars, his damages so sustained as aforesaid, and the costs of this suit."

The jury made a number of special findings, but the court refused to submit the following question asked by defendant: "Was not the hand-car from which plaintiff fell and was injured, used continuously, without any repair, upon the railroad until the surfacing thereof was completed, and then removed to McPherson railroad, and there used for the purpose it was used before it was broken?" Defendant excepted to the refusal and also to the overruling of its motion for new trial.

The opinion of the Supreme Court was delivered by Horton, Ch. J., who discussed the questions presented at length. In the course of the opinion the court said: "This case was before us at the July term for 1883. [See 30 Kan. 601.] Since then a new

trial has been had, resulting in a verdict and judgment for \$5,750 and costs. This proceeding has been brought to reverse that judgment. The contention of the railroad company has always been that it had the right to contract for the construction of its road from Solomon City to Beloit; that it did so contract; that by the law it is not liable for the injury sustained by Jones; and that if he received injuries by the culpable negligence of any person or company, the Solomon Railroad Company is not responsible therefor. All the evidence given on the part of the plaintiff below upon the former trial seems to have been again presented at the last trial; and upon that trial additional testimony was introduced by the railroad company, tending to establish that D. M. Edgerton, the president of the Solomon Railroad Company, constructed the road upon his own account from Solomon City to Minneapolis, and that the Kansas Pacific Railway Company constructed the road from Minneapolis to Beloit. We are satisfied with the law as previously declared by this court upon all the questions involved in the former presentation of this case, and several of the same questions therein decided are again elaborately argued. Notwithstanding the additional or further evidence on the part of the Solomon Railroad Company at the late trial, we cannot say it was so conclusive as to overturn the verdict. The jury were the exclusive judges of the weight of the evidence and of the credibility of the witnesses, and, as we said in the former opinion, although the actual facts of the case tend to show that the 'Kansas Pacific was the real builder and owner of the road,' sufficient evidence was before the jury to authorize the verdict. (See *Solomon R. R. Co. v. Jones*, 30 Kan. 601.) Deeming it useless to again discuss the questions of law settled in the former decision and not presented for re-examination, we shall notice only the important matters argued which were not passed upon when the case was here before." * * *

The points decided in the case at bar are sufficiently stated in the official syllabus as follows:

"The case of *THE SOLOMON R. R. CO. v. JONES*, 30 Kan. 601, referred to, and followed.

"Where an employee at work upon the construction of a railroad signs pay-roll receipts, such receipts are *prima facie* evidence of all the statements therein, but are open to explanation by the party giving them; and where such a party testifies that he did not read the receipts, or either of them, and had no opportunity so to do, because at the time he signed them there were too many men waiting to be paid off, and there was no time for him to read the receipts, it cannot be said as a matter of law that the receipts are conclusive evidence against the party giving them.

"In an action against a railroad company to recover damages for

personal injuries, where one of the principal disputed questions is, whether the plaintiff at the time of the injury was in the employ of the railroad company sued, or of a contractor constructing the road, it is error for the court to permit the general question to be asked of plaintiff: 'In whose employ were you at the time of your injury?' But where the witness, upon further examination, narrates in detail all the facts and circumstances connected with his employment, *held*, the error not material.

"A letter to the superintendent of a railroad company containing a brief statement of the injuries of a party, alleging that he was damaged \$500, but rather than go to law would settle for \$200, if the matter was closed up at once, written before the commencement of an action against the company by an attorney who afterward appears in the cause for the plaintiff, is not evidence of the facts admitted therein, unless it be proved that the plaintiff authorized the letter to be written.

"The testimony of a deceased witness at a former trial may be proved by any one who heard and can remember his evidence; and it is sufficient to prove the substance of what the deceased witness testified to on the former trial; and it is not necessary to prove his exact words.

"Where an attorney who was present at the former trial, representing one of the parties in the case, is called to give in evidence the testimony of a deceased witness at that trial, he may refresh his recollection from the bill of exceptions, or read from the bill of exceptions purporting to contain the testimony of the deceased witness at the former trial, if he shows that he examined the bill and assisted in its preparation at the time it was made, and knew, when the matters therein contained were fresh in his memory, that the bill stated what the deceased witness testified to on the former trial. In such a case the testimony of the deceased witness embraced in the bill of exceptions and sworn to be correct by a person present at the former trial, who heard the evidence of the dead witness, goes before the jury in connection with his oral testimony. The correctness of the evidence thus presented may be disputed, and the jury must pass upon it.

"While two employees were working the handles of a hand-car upon the track of a railroad company, which car had been damaged by a severe collision with another hand-car the day before, the handles at both ends broke at the same time. The breaks were within the iron rings or clasps circling the handles. In an action to recover damages, brought against the railroad company by one of the employees injured by the breaking of the handles, it was claimed by the employee that there was no proper examination or inspection of the handles after the collision by the servants or agents

of the railroad company. The company, to establish that there was no necessity for putting the car through a rigid inspection after the collision, offered to prove by the foreman in charge of the car at the time of the collision that he had no reason to apprehend that the handles had sustained any injury, and that he did not suspect that the handles had been injured by the collision. The evidence was rejected. *Held*, that in this there was no error, as the witness was permitted to testify as to all the facts relating to the handles, and to his own acts and the acts of the other parties on the car at and after the collision.

"A trial court ought not to instruct or suggest to a jury that the servants or agents of a railroad company, who are called as witnesses, have any such interest, simply because they are the servants or agents of the corporation, as affects their testimony; there is no legal presumption against the testimony of the servants or agents of a railroad company, simply because they are such servants or agents, and special instructions that they have an interest, or *no* interest, simply because there are such servants or agents, sufficient to affect their testimony, are wholly unnecessary.

"If possible, the findings of a jury should be so interpreted as to support the general verdict, rather than given an interpretation which would overturn and destroy it."

On the former trial there was a verdict and judgment for plaintiff for \$4,250. See *SOLOMON R. R. CO. v. JONES*, 30 Kan. 601 (*July Term, 1883*).

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY v. SLATTERY.

Supreme Court, Kansas, July Term, 1896.

[Reported in 57 Kan. 499.]

YARD CLERK INJURED IN COLLISION OF SWITCH ENGINE ON WHICH HE WAS RIDING AND A PUSH-CAR CLOSE TO THE TRACK.—1. An ordinary push-car was carried by the employees of a railroad company a safe distance from the track, and there blocked in the ordinary way to prevent it from drifting toward the track. Afterward six or eight boys, not connected with the railroad company, took it from the position in which it was left and attempted to put it upon the track, but before doing so they were interrupted and ran away, leaving it dangerously close to the track. Shortly afterward a switch engine, upon which a yard clerk was riding, came along and collided with the push-car and injured the yard clerk. In an action to recover for the injury, it is *held* that the company was not negligent in leaving the push-car as it did and without other locks or guards.

2. FAILURE OF ENGINEER AND SWITCHMAN ON SWITCH ENGINE TO KEEP LOOKOUT FOR OBSTRUCTIONS.—Upon the evidence in the case it is *held* that there is testimony tending to show that those in charge of the switch engine failed to exercise due care in keeping a look out along the track for obstructions, and in controlling the engine so as to prevent the collision and injury.
3. RULES AND REGULATIONS DISREGARDED—WHEN EMPLOYEE NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.—Ordinarily, the wilful disobedience of a rule which is operative should be held as negligence on the part of an employee of a railroad company, but where the rule is habitually disregarded and a different practice has long been followed by the employees with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative.

(*Syllabus by the court.*)

ERROR from Sedgwick District Court. The case is stated in the opinion. *Judgment affirmed.*

A. A. HURD, O. J. WOOD and W. LITTLEFIELD, for plaintiff in error.

J. D. HOUSTON and J. F. CRAIG, for defendant in error.

Johnston, J.—This action was brought by M. Frank Slattery against the railroad company to recover for personal injuries sustained by him in a collision between a switch-engine upon which he was riding and a push-car in the yards of the railroad company at Wichita. He was employed by the company as a yard clerk, and his duties consisted mostly of ascertaining the numbers of freight cars upon their arrival in the yard, making a list of them and marking their points of destination. He received a list of the cars in each train from the conductors of the trains as they arrived, and from such list personally examined the cars mentioned therein; and for such purpose he was obliged to visit all parts of the yards, which were about two miles in length. On account of the length of the yards he frequently rode on the switch-engine from one part of the yards to another. On April 5, 1891, he had occasion to go to the southern part of the yards for the purpose of ascertaining the numbers of the cars and marking the same. He boarded the switch-engine, which was backing south, pushing three or four cars. There was a footboard around the tank of the switch-engine, and he took a position on it on the east side of the tank and near the rear end. The engine then proceeded southward, stopping to place some of the cars on different tracks; and when going at about the rate of ten miles an hour it came in contact with a push-car, which was upon the side of the

track, and a portion of which projected over so far that it caught Slattery's foot and injured it so that amputation of a portion of it was necessary. The push-car had been left in the yards two days before and carried a safe distance from the track, where it was blocked so that it could not run onto the track. On the day of the accident, and about fifteen minutes before it occurred, six or eight boys, ranging from nine to thirteen years of age, who were in no way connected with the railroad company, took the car from its position and attempted to put it upon the track, but, being discovered, left it close to the track and ran away. It was an ordinary push-car, without propelling force, with two handles at each end extending out therefrom so that it could be put on and off the track. The engineer saw the push-car a short time before the engine collided with it, but states that he did not observe that it was so close to the track as to be dangerous. At the same time a switchman named Wagner, one of whose duties it was to keep a lookout for obstructions on the track, was standing near the end of the tender. The engineer testified that Slattery and Wagner were between him and the push-car and to some extent obstructed his view. The jury found that the company was guilty of culpable negligence: "First, leaving push-car unlocked; second, negligence on the part of the engineer in not stopping engine after observing push-car; third, negligence, on the part of Mark Wagner in failing to see the push-car in the performance of his duties." The jury returned a verdict in favor of Slattery for \$3,000; and from the special findings it appears that \$250 was allowed for the pain suffered and \$2,750 was allowed for permanent injuries.

In our view the first ground of negligence is not sustained. The push-car was not in itself a dangerous thing. It was placed at a safe distance from the track and was fastened and blocked in the usual way that such cars are secured. It was a cumbrous, heavy thing, weighing from 500 to 1,000 pounds, not easily moved; and, not having any propelling appliances, children would not naturally be attracted by it any more than they would by a mowing machine, a road wagon or other wheeled implement that a farmer would leave near the roadside without thought of risk or liability. It has never been regarded as necessary to house or lock them up, and the railroad company had exercised that degree of care respecting this one that is ordinarily exercised in caring for such cars when

not in use. The company cannot be held responsible for the unlawful acts of third parties in placing obstructions upon its track without its knowledge or consent, unless it should be where its negligence had in some way induced the placing of obstructions upon the track. In the nature of things the company had no reason to anticipate that the push-car would be moved by third parties upon or dangerously close to the track, and in the absence of other negligence it would not be liable for injuries resulting from such removal. *Robinson v. R'y Co.*, 7 Utah, 493.

It cannot be said, however, that the company was free from negligence in failing to stop the engine before the collision occurred. It was the duty of the engineer, as well as the switchman, who was riding near the end of the tender, to keep a lookout for obstructions upon the track. Whether the engineer and the switchman, in the discharge of their duties, should have observed the obstruction in time to have stopped the engine and avoided the injury, was a matter for the determination of the jury. The engineer testified that he saw the push-car before they reached it, and that he could have stopped the engine in time to have prevented the injury if he had known that it was dangerously close. He admits that he saw it when forty or fifty feet away, and that he could have stopped is shown by his statement that he only ran thirty feet after striking the push-car. As an excuse for not observing the dangerous proximity of the push-car, he states that his view was obstructed to some extent by the plaintiff and Wagner, who were standing on the footboard of the tender, in front of him. It appears, however, that the engineer from his higher position did see the push-car, and it cannot be said as a matter of law that he should not have observed that it was too close to the track to permit the engine to pass. Wagner, who occupied a front position on the hind end of the tender as it advanced, was in a position to see the obstruction, and it was his duty to keep a lookout for the same. He gave no signal to the engineer, and probably failed to observe the danger until the collision occurred. Other duties devolved on him which may have engaged his attention at the moment, but whether he was in the exercise of reasonable care in keeping an outlook was a question for the jury. The obstruction, however, was actually seen by the engineer in ample time to have stopped the engine with the appliances at hand. Could he, by

ordinary care, have seen and appreciated the danger, and could he by due attention and prompt action have avoided the injury? Men of reasonable minds might draw different inferences from the testimony, so that according to the conclusion of fact reached by one there would be culpable negligence, while that reached by another would be that reasonable care had been exercised. In such a case the question of fact is for the jury. *Beaver v. Atch., Top. & S. F. R. Co.*, 56 Kan. 514 (1). It is contended that from the position Slattery occupied there was nothing to prevent him from seeing that the push-car was close to the track, and that as he was familiar with the signals used in the yards it was his duty to signal the engineer in time to avoid the collision and injury. It appears, however, that his duties required him to be on the lookout for cars as he passed down the yards; and he states that he was engaged in looking for cars all the time while he was on the engine, that he had no opportunity to look ahead, and that he did not know anything of the push-car until they came in contact with it. If his duties required him to look in another direction, and he was so engaged at the time, it cannot be said that he was negligent in not observing the car.

It is further contended that Slattery assumed an obviously dangerous position on the footboard of the switch-engine, and that he was riding there in violation of one of the rules of the company. The rule is: "No person will be permitted to ride on an engine excepting the engine man, fireman, and other designated employees in the discharge of their duty, without a written order from the proper authority." While he appears to have had no written authority to ride, he doubtless was warranted in doing so by the well-established custom of the yards and by the sanction and approval of those in charge of them; in fact, in the present instance, he was directed by the foreman to step upon the engine and ride down to the end of the yards for the purpose of finding and marking certain cars. For several years he had ridden back and forth upon the engine, and

1. *Car inspector injured — Defective track — Negligence for jury.*—In *BEAVER v. ATCHISON, TOPEKA & SANTA FE R. R. Co.*, 56 Kan. 514 (January Term, 1896), car inspector and repairer passing over pile of cinders on track losing his balance, falling on

adjoining track, struck by passing engine and leg broken in consequence thereof. judgment for defendant on demurrer was *reversed*, it being held that the question of plaintiff's negligence was for the jury to determine.

the yardmaster, his superior officer, had directed him to go upon the engine whenever it would take him to his work faster than he could get there by walking. He had ridden on the engine in the presence of the superintendent and apparently with his sanction and approval. Ordinarily, the wilful disobedience of a rule should be held to constitute negligence, but where the rule is habitually disregarded, and a different course has long been pursued by employees with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 662; *Union Pac. R'y Co. v. Springsteen*, 41 Kan. 724 (1). We cannot hold as a matter of law from the testimony that Slattery was guilty of contributory negligence.

The charge of the court fairly presented the case to the jury, and none of the questions upon the instructions or findings of the jury seem to require special attention.

The judgment of the District Court will be affirmed. All the justices concurred.

ROUSE (AS RECEIVER DE BONIS NON OF THE MISSOURI KANSAS & TEXAS RAILWAY COMPANY) V. LEDBETTER.

Supreme Court, Kansas, January Term, 1896.

[Reported in 56 Kan. 348.]

YARD SWITCHMAN INJURED — PLEADING — ORDINANCE.— 1. In an action brought by a yard switchman against the receivers of a railway company to recover damages for personal injuries sustained in their service while attempting to make a coupling, by reason of slipping on an incline negligently constructed and maintained by the receivers, adjoining a new track, as part of a street sidewalk in a city, it was unnecessary for the plaintiff to allege the violation of any ordinance in the construction and maintenance of such incline.

2. CONTRIBUTORY NEGLIGENCE — EVIDENCE.— That a yard switchman has failed to notice a small incline forming a connection between an outside track and a sidewalk, and which he might have often seen if his attention had been directed to it, is not conclusive evidence of contributory negligence on his part, or a waiver of negligence of the master, in an action brought by the yard switchman against the master to recover damages for personal injuries sustained by reason of slipping on such incline, the same being covered with snow.

(Syllabus by the court.)

1. The cases cited are reported with the Kansas cases in this volume of *AM. NEG. CAS.*, pages 56 and 133.

ERROR from Labette District Court. *Judgment affirmed.*

"At May term, 1891, the defendant in error recovered a judgment against the receivers of The Missouri, Kansas and Texas Railway Company for \$4,500 on account of personal injuries sustained in the yards at Parsons on January 8, 1891, resulting in the loss of his left hand, which was amputated above the wrist joint. He was on that day engaged as a helper, following a switch-engine at work at and near Johnson avenue. While attempting to make a coupling between a standing box car on the north side of said avenue and a moving one which he had been riding, and from which he alighted at or near the sidewalk, he slipped on an incline forming the connection between the east rail and the end of the sidewalk, and in struggling to avoid being run over by the moving car, he threw up his left hand which was caught between the drawheads of the standing and the moving car. The surface of the ground, the sidewalk and the incline were covered by a recent fall of snow, which was melting, and this made the incline slippery. The only negligence charged against the receivers is that this incline, as constructed and maintained by them, was dangerous to the yardmen in making couplings or doing other work upon the ground at that point, and that the plaintiff below was unaware of its existence, at and before the time of sustaining said injury. Johnson avenue at that point crossed a tract known as the 'Railroad Reserve,' owned by the company, and several tracks crossed the avenue. In 1887, while the Missouri, Kansas & Texas railway was being operated under a lease by the Missouri Pacific Railway Company, the latter company was by ordinance required to construct a wood sidewalk of the third class along the north side of Johnson avenue across the railroad reserve, the ordinance containing no direction as to the grade of the sidewalk, nor how it should be constructed, except as above stated. The sidewalk was put down, and it remained there until the summer of 1890, when the receivers put in a side-track principally for the accommodation of a new elevator owned by Steele & Busby. In order to do this, the receivers took up part of the sidewalk and laid the new track upon a somewhat lower level. This side-track did not cross the sidewalk at right angles, but the old sidewalk was so cut off at a distance from the east rail about 30 inches on the north side, and eighteen inches on the south side of the sidewalk. The top of the rail was about six inches lower than the top of

the sidewalk, and boards were placed across the end of the sidewalk and alongside of the rail, the top of the plank being an inch or two lower than the top of the rail. This connection between the end of the walk and the east rail is the incline upon which Ledbetter slipped and fell. It does not appear that the receivers made any application to the mayor and council for leave to take up this sidewalk, and there is some conflict in the testimony as to whether or not the work was done under the direction and to the approval of the street commissioner; but the jury found that it was not, and the evidence shows that the work was done and the incline put in by the servants of the receivers, and it does not show that any grade had ever been established by the city. Some other facts appear in the opinion, filed January 11, 1896."

T. N. SEDGWICK, for plaintiff in error.

W. D. ATKINSON, for defendant in error.

Martin, Ch. J.—1. It is alleged in the petition, among other things, in substance, that the sidewalk on the north side of Johnson avenue was constructed and maintained as required by an ordinance of the city, and it is contended by the plaintiff in error that the manner of making the connection from the level of the sidewalk to the level of the new track is presumed to have been conformable to the requirements of the city ordinance, and there is no allegation that the receivers had in any manner ignored any such ordinance, and therefore the petition was insufficient to state a cause of action. It was alleged, however, that the defendants below "wrongfully and negligently made an abrupt connection between the said two levels by inclining boards at an angle of about thirty degrees * * * from the level of said sidewalk to the upper surface of the east rail of said newly-constructed track," and no presumption obtains that the city had established any grade, nor that it exercised any supervision over the construction of the new side-track, nor in making the connection between it and the end of the old sidewalk. It was unnecessary for the plaintiff below to allege the violation of any city ordinance in adjusting the connection between the new side-track and the old sidewalk.

2. It appears that Ledbetter had been working in the yards about a year, but nearly all the time in the west yards, and remote from Johnson avenue; yet he worked in the east yards for eight or 10 days next prior to his injury, though most of the time he was doing field-work, and not following the engine.

It was in evidence, however, that he had crossed Johnson avenue many times during those days, either upon the footboard of the engine, on cars, or afoot; but he testified, and the jury found, that he never noticed this incline connecting the Steele & Bushby switch with the end of the old sidewalk. He further testified that he had never made any coupling or performed any work at that particular place. The plaintiff in error contends, however, that he was bound to take notice of it, and cannot be heard to say that he did not, and that the case comes within *Rush v. Mo. Pac. R'y Co.*, 36 Kan. 129, and others of like import (1). In the *Rush* case, however, the yardman got his foot caught between a main rail and the guard rail, and was run over and killed, and the negligence charged against the company was in failing to block between the rails; but there were about twenty such places in the yards, and none of them were blocked, and it was held that the yardman must have had knowledge of the want of blocking, and that he waived any negligence that might otherwise be imputable to the railway company on that account. In the present case there was no such apparent danger. The incline was east of all the tracks and extended along the east rail of the new track only the width of the sidewalk; and while the jury found that, by the reasonable use of his eyesight, Ledbetter might have seen it while crossing Johnson avenue, yet they say it was not plainly visible from all the tracks there. Besides, it should be remembered that it was covered to a considerable depth with snow at the time of the casualty, and that, if he had known of the incline being at or about the place where he alighted from the car, he might not have noticed that he was stepping onto it. We do not think that the failure of Ledbetter to notice this incline during the several days that he might have seen it, had his attention been called to it, nor the fact that he stepped upon it to make the coupling, is conclusive evidence of contributory negligence on his part, nor that he waived the risks attendant upon stepping thereon for the purpose of making the coupling. The faculty of close observation of objects is largely a gift.

1. *Yard switchman run over and killed — Defective track* — In *RUSH, ADM'X v. MISSOURI PACIFIC R'Y CO.*, 36 Kan. 129 (January Term, 1887), the yard switchman while between cars trying to remove coupling pin caught his foot between main and guard rails, and run over and killed, judgment for defendant was *affirmed*, on the ground that deceased knew the condition of the tracks and assumed the risk.

Some persons may walk once along a street and be able, without any special effort, to describe every prominent object upon and every projection into the street, while others might go up and down the same street for a year, who could not describe such objects and projections. If Ledbetter had ever walked upon this incline, doubtless he would have noticed it; but we cannot judicially say that his failure to observe it as he crossed Johnson avenue from time to time in doing his work was conclusive evidence of negligence on his part which ought to preclude a recovery for injuries sustained by reason of the negligence of the receivers. The master is in duty bound to provide a reasonably safe place for his servant to work. Many dangers necessarily attend the performance of the duties of a yard switchman, but the master is not allowed to increase the hazards of his servant by placing pitfalls, obstructions, traps or inclines in his path, whereby he may lose his footing and be mangled or killed; and in such case, where there is no contributory negligence on the part of the servant, and his conduct has not been such that the court or jury must say that he has waived the negligence and assumed the risks, a recovery may be had on account of an injury resulting therefrom. *Kansas City, Ft. S. & G. R. R. Co. v. Kier*, 41 Kan. 661, 15 Am. Neg. Cas. 56, *ante*.

No complaint is made because of instructions given or refused, nor on account of the admission or rejection of testimony, and, finding no material error in the case, the judgment must be affirmed. All the justices concurred.

YARD SWITCHMAN COUPLING CARS CAUGHT BETWEEN PROJECTING TIMBERS AND CAR AND KILLED — SPECIAL FINDINGS — GENERAL VERDICT. — ATCHISON, TOPEKA & SANTA FE R. R. CO. v. BROWN, Adm'r, 33 Kan. 757 (*July Term, 1885*), was an action brought by Joseph Brown, as administrator, to recover damages for the benefit of the next of kin of William Haas, deceased, who was alleged to have lost his life on November 17, 1879, by reason of the negligence of the railroad company while the said William Haas was in the performance of his duties as an employee of the company. On the day named Haas was a yard switchman in the employ of the company at its car yard near the city of Emporia, in the State of Kansas. He went in between a box car and a flat car upon the railroad, and attempted to make a coupling of the cars; his head was caught between projecting timbers on the flat car and the box car, and so crushed that

he immediately died. The jury returned a verdict for plaintiff for \$5,000. The railroad company, after the jury returned their verdict and special findings, moved the trial court (Lyon District Court) for judgment upon the special findings, notwithstanding the general verdict. The overruling of this motion is the error complained of. The Supreme Court *reversed* the judgment holding (as per official syllabus) that: "Where important and material special findings of the jury are without any support in the evidence, and where other findings are contrary to the evidence, and still other findings evasive and inconsistent, and it appears from such findings that the jury either misconceived the import of portions of the testimony, or else did not make fair and impartial answers to the questions of fact submitted, the general verdict cannot stand, although it has been approved by the trial court."

The foregoing appeal in the BROWN case was the fourth time the case had been in the Supreme Court. See 26 Kan. 443; 29 Kan. 186; and 31 Kan. 1. When the case was at the July term, 1883, VALENTINE, J., delivered the opinion of the court, referred to the admitted facts of the case, and the facts claimed to have been established by the parties to the litigation, and commented thereon at length and declared the law applicable to the case. See BROWN v. ATCHISON, T. & S. F. R. R. Co., 31 Kan. 1, 9-17.

In ATCHISON, TOPEKA & SANTA FE R. R. Co. v. BROWN, ADM'R, 26 Kan. 443 (*July Term, 1881*), yard switchman fatally injured while coupling freight cars, judgment setting aside verdict for plaintiff for \$10,000 (the full statutory limit) was *affirmed*. The District Court held that the verdict was excessive. It appeared that deceased was a single man, leaving neither widow nor child surviving him; that his nearest relative was a mother possessed of some means; and from the history of the young man (26 years of age), that his past life had not been, and his future life probably would not be, of any great pecuniary value to his mother. The Supreme Court (per BREMER, J.), after discussing the points and sustaining the rulings of the District Court, said: "Upon the question of liability, upon the facts of the case, we may add that the case of the same plaintiff in error against Plunkett, 25 Kan. 188, 15 Am. Neg. Cas. 42, *ante*, is very nearly in point, and to that case we refer for any discussion of the principles controlling the liability of the defendant."

EMPLOYEE INJURED IN TRYING TO BOARD SWITCH ENGINE — DANGEROUS POSITION — VOLUNTARY ACT — CONTRIBUTORY NEGLIGENCE. — In UNION PACIFIC R'Y CO. v. ESTES, 37 Kan. 715 (*July Term, 1887*), railroad employee, a helper to a hostler, injured while attempting to get upon a switch engine, the facts and points decided are stated in the official syllabus to the report as follows:

" 1. Ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties, and it is one of the general implied conditions of every contract for service with an adult person, that the servant is competent to discharge the duties for which he is employed. It is the fault of the servant if he undertakes without sufficient skill, or applies less than the occasion requires.

" 2. If, in the discharge of a dangerous duty, an employee of a railroad company voluntarily places himself in a dangerous position, unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and injury occurs to him by reason of his choice, he cannot recover for such injury.

" 3. There is a want of ordinary care in the voluntary attempt of an employee of a railroad company, discharging the duties of a helper to a hostler, to get upon a switch engine in motion by the step at the rear right-hand side of the cab of the engine, when he had no duty to perform in the cab of the engine, and when a safer place for him to get upon the engine would be the rear footboard, which was used for this purpose by that class to which he belonged; and when the danger of the attempt to get upon the side step is increased by the step being obscured to some extent by the escaping of steam from the cylinder-cocks of the engine, and the dust blown up thereby.

" 4. If the rear right-hand step on the cab of a switch engine is defective, and a person employed by the railroad company is discharging the duties of a helper to a hostler in charge of the engine, attempts to get upon such step when the engine is in motion, and when the step is partially obscured by escaping steam, and dust blown up thereby; when he had no duty to perform that required him to get on at such a place, and when the rear footboard was a safer place to get upon the engine in motion; when he deliberately chose to get upon the side step without any directions so to do; when he had adopted the plan of getting on, and riding on the side; when he was afraid to attempt to get upon the front footboard, because the engine was going too fast, and in his attempt to get upon the side step his foot slipped off, rested on the rail, and one of the wheels of the engine so mashed and mangled it as to compel amputation of all that part of the foot in front of the ankle-joint, he cannot recover for such injury on account of the defective condition of the step."

In the *ESTES* case, *supra*, the trial resulted in a verdict and judgment for plaintiff for \$5,000, which, however, was *reversed* by the Supreme Court and judgment ordered for defendant on the special findings.

TRACK HAND INJURED BY HAND CAR BEING THROWN FROM TRACK—RAILROAD COMPANY LIABLE. — In **THE UNION TRUST COMPANY v. THOMASON**, 25 Kan. 1 (*January Term, 1881*), it appeared (as per official syllabus) that: "The plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas and Texas railway, as a trackman, whose principal duty consisted in repairing the track of the railway. To facilitate the work, the trackmen, or "section gang," were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport themselves and their tools from one portion of the track to another. A place was appointed at station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor on the track, it was the duty of the men to transport the hand-car and tools to this station, and there properly dispose of them until required the next day. On April 30, 1878, the plaintiff, at the close of his work on the track, was ordered by his foreman to put his tools on the hand-car, and to get on himself, which order he obeyed—the employees occupying three hand-cars, and the plaintiff riding upon the middle car. On the way to the station the rear car was propelled so fast by the men upon it that it, by the culpable negligence of the men operating it, was thrown against the middle car, which could not escape in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track, and the plaintiff seriously hurt. *Held*, that the plaintiff was injured while in the line of his duty, and that he was within the provisions of the act of February 26, 1874, defining the liability of railroad companies in certain cases. Comp. Laws, 1879, p. 784, § 4914. And further, *held*, that he was entitled to recover for all damages received by him in consequence of the culpable negligence or mismanagement of his co-employees." Judgment for plaintiff for \$2,000 in the Davis District Court *affirmed*.

The statute referred to in the THOMASON case (preceding paragraph) is stated in the opinion by HORTON, CH. J., as follows:

Act of February 26, 1874, section 1. "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." (Comp. Laws 1879, p. 784, § 4914.)

"The provisions of this act are substantially the same as those of the Iowa statute of 1862, and as the Supreme Court of that State had judicially construed the statute to apply to those engaged only in the hazardous business of operating railroads, before its adoption in this State, this construction follows it here." The court cited

Deppe *v.* Chicago, R. I. & P. R'y Co., 36 Iowa, 52, 14 Am. Neg. Cas. 632; Frandsen *v.* Chicago, R. I. & P. R'y Co., 36 Iowa, 372, 14 Am. Neg. Cas. 639; Schroeder *v.* Chicago, R. I. & P. R'y Co., 47 Iowa, 375, 14 Am. Neg. Cas. 643; Pyne *v.* Chicago, B. & Q. R. Co., 54 Iowa, 223, 14 Am. Neg. Cas. 641.

EMPLOYEE KILLED BY FALLING FROM FLAT CAR — RAILROAD COMPANY NOT LIABLE — NEGLIGENCE OF FELLOW-SERVANTS — STATUTE. — In **MISSOURI PACIFIC R'Y CO. v. HALEY**, Adm'r, 25 Kan. 35 (*January Term, 1881*), judgment for plaintiff was *reversed*, the case being stated in the official syllabus as follows:

"1. The act of February 26, 1874, entitled "An act to define the liability of railroad companies in certain cases," is not in conflict with any of the provisions of the Constitution of the State.

"2. This act was adopted by the legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that State follows it to this State; therefore, within the Iowa decisions, it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts toward the employee, is that degree of diligence which men in general exercise in respect to their own concerns, and contributory negligence of the injured employee bars a recovery under the statute, as in other cases.

"3. A person employed upon a construction train to carry water for the men working with the train and to gather up tools and put them in the caboose or tool car, is within the statute making railroad companies liable to their employees for injuries resulting from the negligence of co-employees.

"4. When such an employee upon a construction train, consisting of an engine, two cabooses and four or five flat cars, with the engine coupled on to the caboose, with the flat cars in the rear, all slowly backing at the rate of about four miles an hour, is directed by the conductor in charge of the train to pick up a crowbar lying crosswise near the rear end of the rear flat car, and while in the act of stooping to pick up the bar, falls off and is killed by being run over by the cars, and the fall is caused by a sudden concussion or jerk of the cars from reversing the engine by the engineer to stop the train, on account of cattle near to the track at the rear of the train, and neither the statute, the rules of the company, nor the custom on the trains, requires any preliminary signal or warning to the laborers upon the train to enable them to hold fast, or otherwise secure themselves to the cars, before reversing the engine or stopping the cars under such circumstances: *Held*, that upon these facts the engineer was not guilty of culpable negligence in failing to ring the bell, or

sound the whistle, or giving other signal before reversing the engine. And further, *held*, that the accident, if not directly contributed to by the want of care of the employee falling from the car, may be denominated entirely a fortuitous one, for which the railroad company is not liable.

"5. Negligence is not to be presumed, but must be proved; and where the evidence in an action for damages against a railroad company, under the statute of February 26, 1874, shows that all the co-employees exercised toward the injured employee that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company."

The *HALEY* case, *supra*, was an action brought by the administrator to the estate of William Deal, to recover damages sustained by the minor children of the deceased. The facts sufficiently appear in the foregoing official syllabus to the report of the case. On the trial of the case in the Wyandotte District Court, a general verdict was found for the plaintiff for \$10,000, and judgment rendered thereon, which, however, was *reversed* by the Supreme Court. (THOMAS J. PORTIS, E. A. ANDREWS, and E. J. SHERLOCK appeared for plaintiff in error; BYRON SHERRY, and THOMAS P. FENLON for defendant in error.)

EMPLOYEE INJURED BY BREAKING OF DERRICK — RAILROAD COMPANY LIABLE. — In **UNION PACIFIC R'Y CO. v. FRAY**, 43 Kan. 750 (*January Term, 1890*), laborer injured by the breaking of a derrick, judgment for plaintiff in the Wyandotte District Court for \$2,000 was *affirmed*. HORTON, CH. J., in delivering the opinion of the court said: "This was an action in the court below by William Fray against the Union Pacific Railway Company to recover damages for personal injuries received by him through the alleged negligence of the railway company in failing to properly maintain and safely operate a derrick at Deep Hollow bridge, near a station on the line of the railroad called Tiblow, now known as Bonner Springs. Fray was injured on the 17th day of November, 1882, while engaged as a laborer at a derrick. This action was commenced on the 2d day of February, 1883, and has been in the courts over seven years. It has been here twice before. 31 Kan. 739; 35 Kan. 700 (1). When it was first here the case was reversed on account

1. In **UNION PACIFIC R'Y Co. v. FRAY**, 31 Kan. 739 (*January Term, 1884*), where plaintiff, an employee engaged in building a culvert for defendant, was injured by portions of a defective derrick falling and striking him on the head and face, defective appliance being alleged, judgment for plaintiff for \$2,000 was *reversed*, for misleading instructions and incorrect special findings. A subsequent trial of the **FRAY** case

of irrelevant instructions, and the evasive and untrue answers of the jury. The second time it was here it was reversed on account of incompetent evidence, erroneous instructions, and the failure of the jury to answer questions submitted to them in an intelligent manner. Upon the first trial the damages allowed by the jury were \$2,000; upon the second trial, \$4,000; and upon the third trial, \$2,000.

"It is unnecessary to give a full description of the derrick, the ropes and other appliances connected with it, as they are already set forth at length in the reports referred to. In operating the derrick, a rope, called a brake-rope, was used. A portion of this was wound around the pinion-shaft. The rope was of sea-grass, and an inch and a half or two inches in size. While the derrick was being used in moving a large stone, the rope broke, the derrick went to pieces, a portion striking Fray on his face and injuring him severely (1).

"The jury, among other findings, found specially that the breaking of the rope was caused by wearing and the burning from friction with the journal, or pinion-shaft; that the rope was perfectly dry at the time it broke, and that if it had been kept wet where it was wound around the pinion-shaft, it would not have burned." * * *

The official syllabus in the FRAY case, *supra*, states the points decided as follows:

"1. A railway company is liable to a laborer, working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition, if such laborer is without fault.

"2. As between a railway company and its employees, the railway company is required to exercise reasonable and ordinary care and diligence in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of the work in which they are engaged.

"3. As between a railway company and its employees, the company is negligent in the use of unsafe or defective machinery, where

resulted in verdict and judgment for plaintiff for \$4,000, which was reversed by the Supreme Court for erroneous instructions, etc. See *UNION PACIFIC RY Co. v. FRAY*, 35 Kan 700 (July Term, 1886).

1. *Railroad employee injured by fall of derrick*—In *KANSAS PACIFIC RY Co. v. LITTLE*, 19 Kan. 267 (July Term, 1877), judgment for plaintiff in the Wyandotte District Court for

\$1,050 was affirmed. Plaintiff was injured by the fall of a derrick upon him, while in the employ of defendant as a laborer, in building the culvert. The jury found that there was no negligence in originally providing the derrick, but that it became defective while used in building the culvert, and that Owens, the foreman of the job, continued to use it after he knew of its defective character.

it has notice of the defect and fails to exercise reasonable and ordinary care in remedying such defect.

"4. Findings of fact, if supported by sufficient evidence, will be construed so as to support the verdict, if such a construction can be fairly given, and all findings are to be harmonized, so far as possible."

In the FRAY case, *supra*, judgment for plaintiff for \$2,000 was affirmed.

BRIDGE CARPENTER INJURED BY NEGLIGENCE OF CO-EMPLOYEE—RAILROAD COMPANY LIABLE.—In **CHICAGO, KANSAS & WESTERN R. R. CO. v. PONTIUS**, 52 Kan. 265 (*July Term, 1893*), it was held (as per official syllabus) that "a bridge carpenter, employed by a railroad company in loading timbers on a railroad car for transportation to another point on the company's line, may recover damages from the company under § 93, chapter 23, General Statutes of 1889 (1), for injuries sustained while so employed, occasioned by the negligence of a co-employee. *Union Pac. R'y Co. v. Harris*, 33 Kan. 416; *Atch., T. & S. F. R. Co. v. Koehler*, 37 Kan. 463" (2). At the trial in the Dickinson District Court there was a verdict and judgment for plaintiff for \$2,000. On defendant's appeal to the Supreme Court the judgment was affirmed. The facts in the PONTIUS case are stated in the official report as follows:

"Clifford R. Pontius was employed by the defendant company as a bridge carpenter, and worked in that capacity at various points on the line of defendant's road. A bridge was constructed across the Verdigris river, in Greenwood county. The false work used for support in its construction was taken down, and the timbers of which it was composed were hoisted and loaded into cars on the bridge, to be transported to some other point on defendant's road. The timbers were muddy and slippery. The mode of hoisting them was to attach a rope or chain to the timbers, and to raise them by means of a pile driver. When a stick was raised to a sufficient height, a rope was thrown around the lower end of it, and a number of men, of whom plaintiff was one, would pull it out on the car.

1. The section in the statute referred to, namely, section 93, chapter 23 of the General Statutes of 1889, is as follows:

"Sec. 93. Every railroad company organized and doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence

of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage."

2. The cases cited are reported with the Kansas cases in this volume of *AM. NEG. CAS.*, pages 132 and 129.

A chain had been used on the end of the rope to hold timbers which were being hoisted, and several pieces had been raised in that way. The chain, however, was thrown aside, and one piece was raised with the rope. When the men undertook to pull it back on the car, the rope slipped off, the timber fell, and caused the injury for which the plaintiff sues. The jury rendered a verdict in favor of the plaintiff for \$2,000."

RAILROAD EMPLOYEE INJURED — DEFECTIVE APPLIANCE — SPECIAL FINDING — EVIDENCE — VERDICT — NEW TRIAL. — In **KANSAS CITY & PACIFIC R. R. CO. v. RYAN**, 52 Kan. 637 (*January Term, 1894*), the case is sufficiently stated in the official syllabus as follows:

"1. Between the railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its road. *Atch., T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 15 Am. Neg. Cas. 19, *ante*.

"2. It does not necessarily follow that the special inspection given by a manufacturer, or, in a repair shop, by the expert iron workers therein employed to discover any latent or concealed defect in a tool or instrument for use, like a lifting jack, before the same is sent out for sale or use, is demanded by railroad companies, bridge builders, house raisers, or other persons using such a tool in their work; but, of course, a railroad company, and every other person, is liable for injuries to their employees from a defect in their tools and other appliances used in their work when such defect is visible or known, or might have been known by the exercise of reasonable and ordinary care and diligence.

"3. If a railroad company purchases an ordinary tool or implement, like a lifting jack, of a well-known and reliable dealer in such tools, and, at the time of the purchase there is a latent or concealed defect therein, consisting of a defective weld of the foot attached to the jack, which is not visible, yet if, after use thereof by the railroad company, such jack, on account of its cogs being worn or broken, is sent in for repairs to the railroad shops of the company, and if, in repairing the jack, it was or ought to have been the practice at the shops, before the jack is sent out again for use, to examine and inspect all its parts to ascertain if any other defects exist necessary to be repaired, and any reasonable examination or inspection by the iron workers at the shops would have disclosed the defective weld of the foot of the jack, then the railroad company is negligent in sending out from its own repair shops the jack for use in a defective condition, even if the defect is not visible.

"4. Where an important special finding of the jury, which would of itself be sufficient to sustain a verdict and judgment, is wholly unsupported by any evidence, and such special finding is the probable support for other important and material findings, and the verdict is against the great preponderance of the evidence, it is clear that the case was unfairly tried, and that a new trial should be granted."

In the RYAN case, *supra*, judgment for plaintiff for \$5,000 was reversed.

RAILROAD EMPLOYEE INJURED BY MACHINERY — DUTY AND LIABILITY OF RAILROAD COMPANY — SUPERINTENDENT — FELLOW-SERVANT — DEFECTIVE MACHINE — EVIDENCE. — In **ATCHISON, TOPEKA & SANTA FE R. R. CO. v. McKEE**, 37 Kan. 592 (*July Term, 1887*), railroad employee in car shops of railroad company injured by alleged defective saw, judgment for plaintiff in the Shawnee Superior Court for \$2,000 was *affirmed*, the facts being stated in the report of the case as follows: Plaintiff "had been employed in the car shops of the defendant at Topeka, Kansas, and while sawing truss-rod blocks had his right hand cut off at the wrist. He complains in his petition of three distinct grounds of negligence on the part of the defendant:

"First, that the timber furnished him for sawing was shattered and riven; second, that the saw furnished him was cracked, with broken teeth and unsafe; third, that the table or frame which held the saw was insecure, not holding the saw firmly, so that when it was used in sawing it would vibrate or wobble. It appears that while sawing a block, a wedge-shaped sliver or splinter was sawed off inside the block, and falling down beside the saw, wedged it; the block was thrown out, or "kicked," as it was termed in the evidence, and the wrist of his right arm fell upon the saw and was severed. The saw in question was claimed to be defective in this, that one tooth was out, and from the place where it was broken a crack in the blade of the saw extended about four inches; on the opposite part of the saw was another crack, extending about two or three inches, and there is some testimony of still another smaller crack in the saw-blade at another place. This saw was hung up on a post back of the table which held the saws used by the plaintiff. Each table was furnished with several saws, which could be taken off and put on when needed, and for this table six or eight were given to plaintiff. He had noticed that this saw was defective, and had put it upon a peg next to the post and hung other saws over it. The morning that this accident occurred he had been at work at his bench using another saw, for the purpose of sawing lighter material than truss-rod

blocks. He had been called away on business to another part of the shop, and while absent some person went to his frame, took off the saw he had been using, and fixed the saw in question thereon. He, returning, noticed the pile of timber to be sawed into truss-rod blocks lying beside the frame, and seeing another and larger saw than the one he had left on the table, lowered it, as he could by means of machinery, and proceeded to saw the block in question. He was injured in sawing the first block. In regard to the table upon which this saw was placed, there was evidence introduced tending to establish these facts: It was of a pattern unlike any other frame or machine in the shops of the defendant, but one of the witnesses testified that he had seen such a one in car shops in the east. The mandrel that held the saw where it went into the arbor had worn a little, and had been loose before; the person who had used this machine before the plaintiff had allowed it to heat and become worn, and it had been repaired by putting in babbiting metal. The plaintiff had often complained of this table or frame, and the vibration or wobbling of the saw, and it had been fixed by Mr. Young, who was an assistant of a Mr. Cook, who was the man who looked after the machinery in the shops. On the Friday or Saturday prior to the Monday upon which this accident occurred, the plaintiff had complained to Mr. Young of the vibration of the saw, and Mr. Young on Saturday night tightened the screws and fixed the machine, as he told the plaintiff Monday morning before commencing work. The plaintiff did not notice the vibration of the saw when he first went to work Monday morning at the light stuff, but when he returned and commenced to saw the heavier material, he discovered it upon sawing the first half of the first block. After the accident this frame was continued in use, but after some time there was a wooden screw fixed to the side, and slats were added to the frame to make it firm." * * *

The Supreme Court decided the case (as per official syllabus to the report) as follows:

"1. It is the duty of a company engaged in manufacturing by machinery to provide its employees with machines and appliances suitable for the service required, and if it fails in that respect it is liable to its servants for injuries sustained by reason of unsuitable machinery.

"2. Where a company so engaged employs a person to inspect, repair and provide machinery for others to operate who are employed by the same company, he stands in the place of master to those who operate such machinery, rather than that of a fellow-servant.

"3. Where a person operating a machine complains to the superintendent of machinery that it is defective and unsafe, and such superintendent repairs it, and tells the operative he has done so, it is not negligence for such operative to continue at work at the machine,

although it afterward appears that the repairs were not substantial.

"4. Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent as tending to establish that it was not safe at the time of the accident.

"5. A master's duty is performed when he furnishes for his servants machines which are reasonably and adequately safe, and it is error for a court to instruct the jury that it is his duty to provide safe machinery; but when the correct rule is clearly and plainly stated in the same instruction and in almost the immediate connection, and it appears from the findings of fact that the machine inquired about was defective and out of repair, it is not such error as necessitates a reversal and retrial of the action, when it further appears that it was tried upon the theory that such machine was not perfectly safe."

In the *McKEE* case, *supra*, judgment for plaintiff for \$2,000 was affirmed.

NOTES OF KANSAS CASES ARISING OUT OF INJURIES TO EMPLOYEES IN SERVICE OF RAILROAD COMPANIES.

1. Brakeman injured.
 - a. COUPLING CARS.
 - b. DEFECTIVE TRACK, ETC.
 - c. FLYING SWITCH.
 - d. RAILROAD WRECK.
2. Carpenters injured.
3. Car repairers injured.
4. Conductors injured.
5. Laborers loading cars, etc.
6. Minor employees injured.
 - a. MACHINERY.
7. Section men injured.
 - a. SECTION FOREMEN.
 - b. SECTION HANDS.
8. Switchmen injured.
 - a. DEFECTIVE BRIDGE.
 - b. FLYING SWITCH.
 - c. LADDER OF CAR.
 - d. THROWN FROM CAR.
 - e. YARD SWITCHMAN.
9. Track hands injured.
10. Miscellaneous.

1. Brakemen injured.
 - a. COUPLING CARS.

Brakeman injured coupling cars.

In *MISSOURI PACIFIC R'Y Co. v. HOLLEY*, 30 Kan. 465 (July Term, 1883),

employee acting as brakeman while attending to coupling caught between cars and crushed, judgment for plaintiff for \$2,750 was affirmed.

Brakeman injured coupling cars.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. IRWIN*, 35 Kan. 286 (January Term, 1886), brakeman coupling cars injured by thumb and finger of left hand catching between bumpers of engine and car, caused by alleged negligent act of engineer, judgment for plaintiff for \$300 was reversed, for erroneous instruction on a question not made by the pleadings.

Brakeman injured — Defective brake — Excessive damages.

In *MISSOURI PACIFIC R'y Co. v. DWYER*, 36 Kan. 58 (July Term, 1886), brakeman injured while attempting to set a brake, a defective brake staff being alleged, verdict for plaintiff for \$10,000 was held excessive, and the judgment was reversed, unless plaintiff agreed to a remittitur of \$3,000, in which case judgment for \$7,000 would be rendered in his favor. Plaintiff was twenty-four years old at time of accident, and injury resulted in amputation of his leg about ten inches below the knee. It was held in the *DWYER* case that a car repairer or car inspector was not a fellow-servant with a brakeman operating the brakes of a car.

Brakeman injured while between cars — Assumption of risk.

In *CLARK, ADM'X v. MISSOURI PACIFIC R'y Co.*, 48 Kan. 654 (January Term, 1892), railroad employee injured, the case is sufficiently stated in the syllabus to the official report as follows:

"1. Where the servant has equal knowledge with the master of the construction and condition of the road-bed of a railroad company, and knows all of the dangers and hazards incident to his work thereon, such servant assumes all the risks and hazards of his employment.

"2. In constructing a branch of one of the principal railroad lines of the State, dirt ballast was used between the tracks of the road, the dirt or filling not extending to the end of the ties, but the road-bed was raised at the center, sloping down toward the end of the ties, leaving no dirt under them. A head brakeman, familiar with the construction of the road-bed, embankment and tracks, and having control of the movement of the train, just after dark, when the road-bed was covered with snow which had fallen after some sleet, directed the engineer to back the train up, and while the train was moving slowly backward, he stepped in between two cars to uncouple them, and slipped and fell with his knee across the rail. In this condition he was run over and his knee crushed. Subsequently, his injured leg was amputated, and soon afterward he died. Held, under these circumstances, no negligence can be imputed to the railroad company.

"3. A trial court commits no error in refusing evidence outside of the allegations of the pleadings, and not within any of the issues framed thereby."

In the *CLARK* case, *supra*, judgment for defendant on demurrer was affirmed.

Brakeman injured while coupling cars — Railroad company liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. LANNIGAN*, 56 Kan. 109 (July Term, 1895), judgment for plaintiff for \$6,300 in the Johnson District

Court was *affirmed*. It appeared that Lannigan was a brakeman in defendant's employ and in attempting to couple two cars, constructed with double dead-woods, on a dark night, had his right hand crushed, because his lantern, furnished him by the company, was defective and failed to furnish proper light. The injury was received in Missouri where the common-law rule prevails that the master is not liable for injuries to an employee caused by negligence of fellow-servant. It was held that where the proximate cause of the injury was the failure of defendant to furnish plaintiff with a suitable lantern, the fact that a co-employee contributed to the injury by his negligence did not necessarily bar a recovery.

Brakeman injured while coupling cars—Wilful negligence—Erroneous instruction.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. WELLS*, 56 Kan. 222 (July Term, 1895), judgment for plaintiff for \$4,750 in the Butler District Court was *reversed* for improper instruction on wilful negligence, where there was no evidence of such negligence, and for failure of jury to return fair and truthful answers to material special questions. It appeared that William M. Wells, plaintiff's intestate, was a brakeman on a freight train of defendants' in which was a flat car loaded with poles which were negligently allowed to project over the end of the car. He, with others, started with the train in the night-time, and it appeared that his attention was not drawn to the car or its condition until about the time he was injured. He uncoupled the train from the car loaded with poles with safety, but about ten minutes later, when he entered from the other side of the train to couple it again to the car loaded with poles, his head was caught and crushed between one of the projecting poles and the car in front of it. The accident occurred about midnight, when it was raining and very dark, but the brakeman had a lighted lantern with him. The question of contributory negligence was held to be one for the jury to determine. The case of *Atchison, Topeka & Santa Fe R. R. Co. v. Plunkett*, 25 Kan. 188, 15 Am. Neg. Cas. 42, *ante*, was *distinguished*.)

Brakeman run over and killed—Misleading instructions.

In *MISSOURI PACIFIC R'y Co. v. GIBSON*, ADM'X, 56 Kan. 661 (January Term, 1896), judgment for plaintiff for \$3,000 was *reversed* for misleading instructions. The official syllabus states the case as follows: "C., a brakeman, was run over and killed by a car which he was to couple to some others on a side track not ballasted or surfaced. The negligence of the railway company and the contributory negligence of C. constituted the issues. The court instructed the jury, in effect, that it was the duty of the company to keep the sidewalk in a condition to be 'least likely to cause injuries, so far as this can reasonably be done,' and referred to 'malicious and wilful or wantonly reckless' conduct of the company, although there was no evidence to warrant such an imputation, and suggested a gradation of negligence according to a classification of employees, and gave a definition of contributory negligence tending to obscure rather than throw light upon the subject. *Held*, that a new trial should be granted for misdirection of the jury." Opinion by MARTIN, Ch. J., cited *Kansas Pacific R'y Co. v. Peavey*, 29 Kan. 169, 180, 15 Am. Neg. Cas. 26, *ante*, and *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661, 670, 15 Am. Neg. Cas. 56, *ante*.

Employee injured coupling cars.

In *UNION PACIFIC R'y Co. v. YOUNG*, 19 Kan. 488 (January Term, 1878), judgment for plaintiff in the Leavenworth District Court for \$10,000, for loss of plaintiff's right hand while trying to couple cars, was *affirmed*. Rehearing denied.

See also former decision in the *YOUNG* case, 8 Kan. 658.

*b. DEFECTIVE TRACK, ETC.**Brakeman injured — Defective track etc.—Jurisdiction.*

In *SPEER v. MISSOURI, KANSAS & TEXAS R'y Co., ET AL*, 23 Kan. 571 (January Term, 1880), brakeman injured by alleged negligent running of train, defective track, incompetent servants, etc., judgment for defendants was *reversed* and new trial ordered. The principal point decided related to territorial jurisdiction, the injury happening in Indian Territory.

*c. FLYING SWITCH.**Brakeman run over and killed — Flying switch.*

In *ST. LOUIS & SAN FRANCISCO R'y Co. v. FRENCH*, ADM'X, 56 Kan. 584 (January Term, 1896), brakeman uncoupling cars falling off car while engaged in putting two empty cars into a freight train, and run over and killed, the negligence alleged being the negligent act of the engineer and conductor in making a flying switch, judgment for plaintiff for \$4,500 was *affirmed*.

In *McDERMOTT v. ATCHISON, TOPEKA & SANTA FE R. R. Co.*, 56 Kan. 319 (January Term, 1896), brakeman killed while making a flying switch, judgment for defendant on the special findings, notwithstanding general verdict for plaintiff was *affirmed*.

*d. RAILROAD WRECK.**Brakeman killed in wreck — Special findings inconsistent — Practice.*

In *UNION PACIFIC R'y Co. v. STERNBERGH*, ADM'X, 54 Kan. 410 (July Term, 1894), brakeman killed in a railroad wreck, judgment for plaintiff for \$3,000 was *reversed* for inconsistent special findings.

*2. Carpenters injured.**Carpenter employed in building railroad run over and killed by train — Railroad company liable.*

In *INTER-STATE CONSOLIDATED RAPID TRANSIT R'y Co. v. Fox*, ADM'R (January Term, 1889), 41 Kan. 715, plaintiff's intestate, a carpenter working under a contractor engaged in building the defendant's railroad, run over and killed by a train of cars while he was working on the construction of a trestle, judgment for plaintiff in the Wyandotte District Court was *affirmed*. The verdict was for \$9,000. but new trial being denied upon condition that plaintiff remit one-half of the verdict the condition was accepted and judgment for \$4,500 was rendered for plaintiff. The first paragraph of the official syllabus states the duty of the railway company as follows: "Where men are rightfully at work on a trestle over which a railroad is operated, and the officers and persons operating the road have knowledge that the men are so at work, and that by the operation and running of trains over the trestle while such work is being done the men are thereby placed in great danger, under such circumstances it is the duty of the railroad company to operate and run

its trains with care proportionate to the danger of the men so employed; and where it does not do so, and injury occurs by reason thereof, the company is guilty of culpable negligence."

Bridge carpenter injured by fall caused by defective appliance.

In CHICAGO, KANSAS & WESTERN R. R. Co. v. BLEVINS, 46 Kan. 370 (January Term, 1891) where plaintiff, a bridge carpenter in defendant's employ, by reason of alleged defective wooden maul which he was using fell a distance of about thirty feet, his spine and hip being injured, judgment for plaintiff was *affirmed*. There were three trials in the Wilson District Court, the first resulting in verdict for plaintiff for \$10,000, which the trial court set aside for excessive damages; the jury disagreed in the second trial; and on the third trial plaintiff had a verdict for \$5,000. *Affirmed* by the Supreme Court.

Carpenter struck by an appliance — Railroad liable

In MISSOURI, KANSAS & TEXAS R'y Co. v. YOUNG, ADM'X, 4 Kan. App. 219 (1896), where plaintiff's intestate, a carpenter in the defendant's shops, was injured by the handle of a lifting-jack striking him on the side of the head while being used for lifting a heavy engine tank frame, defective appliance being alleged, judgment for plaintiff in the Labette District Court was *affirmed*.

3. Car repairers injured.

Car repairer injured — Pushing cars.

In HANNIBAL & ST. JOSEPH R. R. Co. v. FOX, 31 Kan. 586 (January Term, 1884), car repairer injured by cars being pushed over his arm, the work being done under direction of defendant's foreman, judgment for plaintiff for \$10,000 was *affirmed*. It was held (as per official syllabus) that: "At common law, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent or employee stands in the place of the master and becomes a substitute for the master, and the master is liable for his acts or his negligence."

Car repairer injured — Insufficient pleading.

In ATCHISON, TOPEKA & SANTA FE R. R. Co. v. O'NEILL, 49 Kan. 367 (July Term, 1892), car repairer injured, his leg being crushed that amputation below the knee was necessary, judgment for plaintiff was *reversed*, on the ground that defendant's motion requiring the petition to be made more definite and certain, it containing only a general allegation of negligence, should have been granted, it being error in the trial court to overrule such motion. On the trial, a general verdict was rendered for plaintiff for \$13,000. Special findings were made, in one of which the jury awarded \$5,000 for pain and suffering; in another \$7,230 for loss of limb, and \$770 for loss of time. Plaintiff remitted the \$770, and judgment was rendered for \$12,230.

4. Conductors injured.

Conductor of construction train injured.

In JACKSON v. KANSAS CITY, LAWRENCE & SOUTHERN KANSAS R. R. Co., 31 Kan. 761 (January Term, 1884), conductor of construction train injured,

judgment dismissing plaintiff's action was *affirmed*. It was held (as per official syllabus) that: "Where the step of a railroad engine is slightly defective, and the conductor of the train has full knowledge of the condition of such step, and continues to use it, he cannot recover damages from the railroad company for injuries claimed to have resulted from the defective condition of the step and received by him while using it. The reversal of an engine in switching and in making up trains is not negligence *per se*; and negligence is never presumed without proof; but in all cases it must be proved."

Conductor falling from car while passing over bridge — Incompetent testimony.

In *SOUTHERN KANSAS R'Y Co. v. ROBBINS*, ADM'R, 43 Kan. 145 (January Term, 1890), passenger conductor fatally injured by falling from car as train was passing over bridge, judgment for plaintiff in the Franklin District Court for \$5,500 was *reversed* for admission of incompetent testimony. It was held that "evidence of the practice and usage of others in climbing the ladder of a box car when a train is in motion, such as deceased fell from, is not admissible to prove due care on his part at the time of the accident." It was also held that "where one of the issues to be tried is whether the person injured was in the exercise of ordinary care, and there were eye-witnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skillful man, are not competent evidence."

5. Laborers loading cars, etc.

Laborer fatally injured while loading cars.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. KOEHLER*, ADM'X, 37 Kan. 463 (July Term, 1887), where plaintiff's intestate, a laborer in defendant's employ, while loading rails on a car was fatally injured by a rail thrown against him by other employees, which crushed his leg, judgment for plaintiff for \$1,500 was *affirmed*.

Laborer injured unloading rails — Assumption of risk.

In *SOUTHERN KANSAS R'Y Co. v. DRAKE*, 53 Kan. 1 (January Term, 1894), railroad employee injured while unloading rails, judgment for plaintiff for \$150 was *reversed* on the ground that plaintiff assumed the risk. Following *Atchison, Topeka & S. F. R. R. Co. v. Schroeder*, 47 Kan. 315, 15 Am. Neg. Cas. 130, *post*.

6. Minor employees injured.

a. BY MACHINERY.

Minor employee injured in machine shop — Foreman's negligence — Railroad liable.

In *MISSOURI PACIFIC R'Y Co. v. PEREGOV*, ADM'X, 36 Kan. 424 (January Term, 1887) judgment for plaintiff for \$3,000 was *affirmed*. The case is stated in the official syllabus as follows:

"Where an ignorant boy, seventeen years old, an apprentice in a machine shop, was directed by the foreman in charge to obey the call and direction of W., another employee, engaged in drilling an engine frame, which work required a skilled mechanic to safely handle; and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the

frame from falling, and in that position attempted to move the engine frame, and directed the boy to move the trestle further under the frame, when it fell and killed the boy: *Held*, that W. and the boy were not fellow-servants, and that the negligence of W. was the negligence of the employer." In such case the employer was held liable for the failure of the foreman to give instructions which, if given and followed, would have prevented the accident.

Minor employee injured by machinery in railroad shop — Railroad not liable.

In *SANBORN* (by next friend) *v* *ATCHISON, TOPEKA & SANTA FE R. R. Co.*, 35 Kan. 292 (January Term, 1886), the case is stated in the official syllabus as follows. "Where, in an action against a railroad company to recover damages for personal injury received by an employee in attempting to oil an iron punch driven by iron cog-wheels which are six or seven feet from the ground or floor of the machine shop, the evidence offered shows that it is not usual to box or fence such machinery, and that the machinery is so arranged with a tight and loose pulley that if a person is going to oil or repair it he can immediately stop the same by simply throwing the belt upon the loose pulley: *Held*, that the failure or negligence to box or fence such cog-wheels is not of itself culpable negligence on the part of the company." "A young man of the age of seventeen years and seven months is presumed to have sufficient capacity to be sensible of danger, and to have the power to avoid it; and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age." Judgment on demurrer *affirmed*.

7. Section men injured.

a. SECTION FOREMEN.

Section foreman fatally injured — Hand-car and train — Railroad not liable.

In *CONDIFF, ADM'R v. KANSAS CITY, FORT SCOTT & GULF R. R. Co.*, 45 Kan. 256 (January Term, 1891), where a section foreman in charge of a gang of men on a hand-car was fatally injured in a collision with a train, having attempted to take the hand-car off the track, and all the men, except plaintiff's intestate, left the track and were uninjured, verdict and judgment for the railroad company was *affirmed*. It was held that "exposure of life by an employee to save life is neither wrongful nor negligent, if attempted within the scope of an employer's duty, unless made under circumstances constituting rashness in the judgment of prudent persons." In such case it is for the jury to say whether the conduct of the party injured in attempt to save life was rash or reckless.

Section foreman injured while unloading rails from car — Assumption of risk.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. SCHROEDER*, 47 Kan. 315 (July Term, 1891), section foreman injured while unloading railroad rails from a "push car," plaintiff and another employee carrying a rail by each end when the other employee let his end fall and plaintiff's end struck him in the lower part of his abdomen and produced a rupture. Judgment for plaintiff for \$3,000 rendered in the Butler District Court was *reversed*, the Supreme Court holding (as per official syllabus) as follows: "While it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employees as safe as is reasonably practicable, yet when the employee with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or

having accepted the same, continues in it with such full knowledge, and without any full promise on the part of the employer, or any reason to expect on the part of the employee, that the employment will be made less dangerous, the employee assumes all the risks and hazards of the employment."

The case of *Southern Kansas R'y Co. v. Drake*, 53 Kan. 1, follows the ruling on assumption of risk in the *Schroeder* case (preceding paragraph).

Section hand injured by negligence of foreman — Railroad company liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. VINCENT*, 56 Kan. 344 (January Term, 1896), the case is stated in the official syllabus as follows:

"1. A crew of section men, consisting of a foreman and two others, were carrying a rail, which weighed about 243 pounds, for the purpose of substituting it for a defective one in the railroad track. The foreman and one of the men supported it on their left shoulders, and the other, who was at the rear end of the rail, supported it upon his right shoulder. When they reached the place where it was to be used, the foreman, who had been in the center, came back and took a position in front of the rear man, for the purpose of relieving him so that he might step aside before the rail was thrown down; and before he had stepped to a place of safety, the foreman gave the word to throw, when the rail was thrown against the leg of the rear man, breaking and otherwise seriously injuring it. *Held*, in an action to recover for the injury, that the foreman was guilty of negligence, and that the character of service in which the injured section man was engaged brings him within the provisions of the statute which makes railroad companies liable to their employees for damages resulting from the negligent acts of other employees.

"2. The fact that the rail, which was a light one, was carried upon the shoulders of the men instead of upon a hand-car, which was the usual method of transporting rails, does not constitute contributory negligence on the part of the injured section man. In the *Vincent* case, *supra*, judgment for plaintiff was *affirmed*.

b. SECTION HANDS.

Section hand injured by steam from passing engine — Personal injuries — Medical examination.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. THUL*, 29 Kan. 466 (January Term, 1883), section hand injured by steam from passing engine, judgment for \$400 for plaintiff in the Shawnee District Court was *reversed* for error in overruling defendant's request for a medical examination of plaintiff. The syllabus to the official report states the point as follows:

"On the trial, in an action for damages for personal injuries of a permanent as well as temporary character to the plaintiff's eyes, where the plaintiff himself testified concerning his injuries, and no physician or surgeon or medical expert was examined as a witness in the case, the plaintiff may be required by the court, upon a proper application being made therefor by the defendant, to submit his eyes to a reasonable and proper examination by some competent expert, for the purpose of ascertaining the nature, extent and permanency of his injuries; the court exercising in all such cases a sound judicial discretion."

A subsequent trial of the *THUL* case resulted in verdict and judgment for

plaintiff for \$2,000, which, however, was *reversed* by the Supreme Court for erroneous instruction as to expert testimony. See 32 Kan. 255.

Section hand struck by passing train.

In *COMSTOCK v. UNION PACIFIC R'Y Co.*, 56 Kan. 228 (July Term, 1895), judgment for defendant in the Logan District Court was *reversed*, on the grounds set forth in the official syllabus as follows:

"In an action against a railway company to recover damages for injuries sustained by a person while employed as a section hand, at work on the track, by a passing train [one of his legs being broken], it is proper to show what the duties of the foreman are with reference to keeping the time and warning the workman of the approach of trains.

"Where in such an action there is evidence tending to show negligence on the part of the company, and where it does not clearly appear that the plaintiff was guilty of contributory negligence, it is error to sustain a demurrer to the testimony."

Section hand injured by flying object — Railroad company liable.

In *SOUTHERN KANSAS R'Y Co. v. CROKER*, 41 Kan. 747 (January Term, 1899), it was held (as per official syllabus) that: "While it is the fault of the servant, if he undertakes without sufficient skill, or applies less than the occasion requires (*Union Pac. R'y Co. v. Estes*, 37 Kan. 715, 15 Am. Neg. Cas. 114, *ante*), a section man who complains of the bad condition of the tool with which he has to work, and is promised a new and good one, and is told to work with the defective tool until the others arrive, and relying on such a promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, is entitled to recover for the damages resulting. His solicitation of employment in a certain line of work is not an assertion that he can perform the labor with defective tools."

The *CROKER* case, *supra*, was tried in the Allen District Court, where judgment was rendered for plaintiff for \$2,654.88, which was *affirmed* by the Supreme Court. Plaintiff, a section man, while using a hammer, was injured by a small particle of stone which struck him in the eye and destroyed its sight. The accident was caused by a defective handle to the hammer.

Section hand injured — Defective appliance.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. SADLER*, 38 Kan. 128 (July Term, 1887), section hand injured in the leg by a defective spike-maul, judgment for plaintiff for \$400 was *affirmed*.

Section hand injured — Fall of iron rail — Railroad liable.

In *UNION PACIFIC R'Y Co. v. HARRIS*, 33 Kan. 416 (January Term, 1885), it was *held* (as per syllabus to the official report) that "a section man employed by a railway company to repair its road-bed, and to take up old rails out of its track and put in new ones, who is injured, without his fault, by the negligence of his co-employee in permitting an iron rail, intended to be placed on the track, to fall upon him while he is assisting in removing the rail from a push-car on the track, is within the terms of section 1, chapter 93, Session Laws of 1874; section 4914, chapter 84, Comp. Laws of 1879." Judgment for plaintiff for \$2,500 *affirmed*; right foot injured.

Section hand injured on hand car — Incompetent evidence.

In *CHICAGO, KANSAS & NEBRASKA R'Y Co. v. BROWN*, 44 Kan. 384 (July Term, 1890), section man in defendant's employ injured on hand-car by his fingers being caught between the handle of the car and a cask or barrel which had become displaced, judgment for plaintiff for \$109.41 in the Pratt District Court, was *reversed* for erroneous admission of parol evidence as to time checks, erroneous instruction as to negligence and erroneous admission of a deposition.

Section hand injured while unloading car — Railroad company liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. BRASSFIELD*, 51 Kan. 167 (January Term, 1893), judgment for plaintiff for \$700 on verdict returned for him in the Johnson District Court was *affirmed*, the Supreme Court (per JOHNSTON, J.,) stating the facts of the case as follows: "Theodore A. Brassfield, who was employed by the Atchison, Topeka and Santa Fe Railroad Company in the capacity of a section hand, was injured while unloading ties from a car, which were about to be used in the repair of the company's track. The injury is alleged to have occurred through the negligence of a co-employee who was assisting in unloading the ties. It is stated that Brassfield had taken hold of one end of the tie, and the co-employee carelessly took hold of the other end and jerked and turned it over so as to throw Brassfield off his balance, causing a heavy strain on him, which produced inguinal and femoral hernia, and also varicocoele. It is averred that the injury is of a permanent character, and was produced without fault or negligence of Brassfield. He laid his damages at \$5,000, and upon a trial the jury awarded him \$700. The errors assigned relate to the admission and sufficiency of the evidence upon which the verdict rests, and also to the instructions given to the jury." * * * The court reviewed the points and held there was no error to substantiate the defendant's objections, and affirmed the judgment.

Section man injured while unloading cars — Excessive damages.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. ROWE*, ADM'X, 56 Kan. 411 (January Term, 1896), section man injured while unloading ties from a box car, one of the ties striking him on the leg and heel, judgment for plaintiff for \$4,000 was *reversed*, for excessive damages.

8. Switchmen injured.*a. DEFECTIVE BRIDGE.**Switchman injured — Defective bridge.*

In *WELD v. MISSOURI PACIFIC R'Y Co.*, 39 Kan. 63 (January Term, 1888), switchman in defendant's yard injured while stepping from locomotive on a bridge over a creek for the purpose of attending to switch, defective bridge being alleged whereby plaintiff's foot was caught and he was thrown under engine, his ribs, spine, etc., being injured, judgment for the railway company was *affirmed*.

*b. FLYING SWITCH.**Switchman killed — Flying switch — Rules and regulations — New trial.*

In *UNION PACIFIC R'Y Co. v. SPRINGSTEEN*, ADM'R, 41 Kan. 724 (January Term, 1889), it was *held* that where "a railway company by a rule prohibited conductors and engineers from making flying switches, the deceased (plaintiff's

intestate, who was a switchman) was not guilty of contributory negligence when the manner of switching by which he was killed had been the usual and customary way of doing the same, though he knew of the rule."

The *SPRINGSTEEN* case was tried in the Pottawatomie District Court, where judgment was rendered for plaintiff for \$6,000, which judgment was *reversed* by the Supreme Court, it being held that "a new trial should be granted when it appears that the only theory upon which a judgment could be sustained is upon a phase of the action not tried, but practically ignored, and another phase thereof appeared to have been thoroughly tried, and regarded by all as the important and pivotal part of the case."

c. LADDER OF CAR.

Defective hand-hold on ladder of car—Switchman injured—Railroad company liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. PENFOLD*, 57 Kan. 148 (July Term, 1896), switchman injured while in the performance of his duties, his shoulder being dislocated by the giving way of a hand-hold upon the ladder of a car which he was attempting to climb, judgment for plaintiff in the Atchison District Court for \$3,750, was *affirmed*. The official syllabus states the points decided as follows:

"1. It is the duty of a railroad company to inspect cars owned by or received from another company, which the employees of the former company are required to handle or use, where there is time and opportunity to do so, and it will be liable to its employees for injuries resulting from defects in such cars which an ordinary inspection would have discovered.

"2. It will not be excused for failure to perform that duty because such cars are only used for a brief time or carried a short distance, nor will the mere fact that the company is not required to repair defects relieve it from the obligation to inspect."

d. THROWN FROM TRAIN.

Switchman thrown from car and killed.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. BUTLER*, 56 Kan. 433 (January Term, 1896), switchman in railroad yard thrown from car on which he was working, owing to negligence of defendant's servants in causing a train of cars to collide with the said car, whereby he was run over and killed, judgment for plaintiff for \$9,450 was *affirmed*.

Switchman thrown from train—Gross negligence—Erroneous instruction.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. WINSTON*, 56 Kan. 456 (January Term, 1896) switchman in railroad yard while attending to his duties in making up a train thrown from train, run over and fatally injured, judgment for plaintiff for \$7,987 was *reversed* for erroneous instruction as to liability of defendant for gross negligence where there was no evidence of such negligence.

e. YARD SWITCHMEN.

Yard switchman injured—Defective appliance—Railroad company not liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. LEDBETTER*, 34 Kan. 326 (July Term, 1885), yard switchman injured while attempting to couple a

moving engine on to a stock car, judgment for plaintiff in the Wyandotte District Court for \$5,000 was *reversed*, the official syllabus stating the case as follows:

"In an action by a yard switchman against a railroad company in whose employ he had been, for injuries alleged to have resulted in consequence of a defect in the draw-bar of a car, or in some of its accompanying appliances: *Held*, that no recovery can be had against the railroad company except by proof of negligence on its part, and that it devolves upon the plaintiff to prove the negligence and to prove all the facts which constitute or make apparent such negligence; and, therefore, where it was not shown that the railroad company had any knowledge of the defect existing in the draw-bar, or in some of its accompanying appliances, prior to or at the time of the injury, or that such defect had existed for any considerable length of time; nor what was the nature or character of the defect, that it was obvious or manifest, or could have been discovered by the exercise of reasonable care and diligence or by any of the tests employed by car inspectors; nor that the car had not been properly inspected by the car inspectors at the yard where the injury is alleged to have occurred, *held*, that no negligence is shown on the part of the railroad company, and that no cause of action against the railroad company has been proved."

Yard switchman falling on track and run over—Excavation on track—Variance—Pleading and practice.

In *SOUTHERN KANSAS RY CO. v. GRIFFITH*, 54 Kan. 428 (July Term, 1894), yard switchman jumping from car catching his foot on projecting tie on track, falling, and arm run over by car, judgment for plaintiff was *reversed* on the ground of variance between the finding of negligence by the jury and the negligence alleged in the finding. The negligence proven at trial and found by jury as a basis for general verdict in favor of plaintiff must correspond with averments in petition. Plaintiff alleged negligent condition of track upon which repairs were being made, but the jury found that the negligence of the railway company was failure to notify yardmaster that such repairs were being made.

9. Track hands injured.

Track repairer thrown from hand-car—Railroad company liable.

In *CHICAGO, ROCK ISLAND & PACIFIC R. R. CO. v. DOYLE*, 18 Kan. 58 (January Term, 1877), track repairer thrown from a hand-car, incompetent servant and defective car being alleged, judgment for plaintiff for \$1,000 in the Leavenworth District Court was *affirmed*. The injuries were to leg, hip, side, shoulder, etc. On the question of a release, the third paragraph of the official syllabus states the point as follows: "Where a party executed a paper, purporting to be a written release, discharging his right of action against a railroad company for injuries complained of, and at the time of executing the same he was so much under the influence of drugs and opiates taken to alleviate his pains, caused by a broken thigh, that he was mentally incapacitated to contract: *Held*, that such a release is voidable, and not a defense to his cause of action. And also *held*, that in such case it was not necessary for him to pay back nor offer to pay back the money received at the time of signing said paper as a condition precedent to his right to sue on his claim for

damages. On the trial, the jury had the right to give the company credit for the money paid at the time the release, so called, was signed."

Employee injured in collision with hand-car.

In CHICAGO, KANSAS & NEBRASKA R'y Co. v. MUNCIE, 56 Kan. 210 (July Term, 1895), judgment for plaintiff in the Doniphan District Court was reversed on the following grounds (as per official syllabus):

"Where special findings of a jury upon matters that are material to the controversy are contrary to the testimony given in the case, the general verdict, upon application therefor, should be set aside and a new trial granted.

"Where the defense in an action to recover for personal injuries alleged to have resulted through the negligence of an employer is that plaintiff was not in the service of the defendant, but was employed by another, testimony that plaintiff had previously brought an action against such other employer to recover for the same injury is admissible."

It appeared that Muncie was employed in procuring and preparing stone to be used as ballast upon the track of the railway. In returning from their work the men rode upon hand-cars, and the car immediately in front of the one on which Muncie was riding was stopped so suddenly that a collision resulted, and he alleged that he was thrown against the lever of the hand-car on which he was riding with great force so as to rupture and otherwise injure him. One of the contentions of the railway company was that Muncie was not working for that company, but that long prior to that time the railway had been leased to and was being operated by the St. Joseph & Iowa Railroad Company.

Employee injured on defective hand-car—Railroad company liable.

In ATCHISON, TOPEKA & SANTA FE R. R. Co. v. MIDGETT, 1 Kan. App. 138 (1895), employee injured through defects in a hand-car on which he was riding while in defendant's service, judgment for plaintiff in the Johnson District Court for \$400, was affirmed.

10. Miscellaneous.

Laborer injured—Defective scantling—Punitive damages—Erroneous instruction.

In CHICAGO, KANSAS & WESTERN R. R. Co. v. O'CONNELL, 46 Kan. 581 (January Term, 1891), railroad employee engaged in digging a tank well, etc., injured by alleged defective construction of scantling, etc., his hand and one or two bones being injured, judgment for plaintiff for \$700 was reversed, the point being stated in the official syllabus as follows: "In an action to recover damages for personal injuries, where there is no testimony showing that the negligence complained of is so gross as to amount to wantonness, and no wilful or malicious acts are proven, it is error for the trial court to instruct the jury that 'they are at liberty to award what are termed exemplary or punitive damages; that is, damages which are given, not on account of any special merit in plaintiff's case, justifying the same, but as a warning and lesson to the defendant, to teach it greater respect and care for the rights and safety of others.'" The case of Kansas City, Ft. S. & G. R. R. Co. v. Kier, 41 Kan. 671, 15 Am. Neg. Cas. 56, ante, cited and followed.

Employee struck by lump of coal from passing train.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. CROLL*, 3 Kan. App. 242 (1896), where an employee working in a ditch along and about eight or ten feet from defendant's track was struck by a lump of coal which rolled from the tender of the engine of a passenger train passing along the road, his head and face and eye being injured, judgment for plaintiff in the Osage District Court for \$1,850 was *reversed*, the evidence being insufficient to establish negligence on the part of the railroad company.

Employee injured while moving an appliance.

In *UNION PACIFIC RY Co. v. MAHAFFY*, 4 Kan. App. 88 (1896), where plaintiff, a boiler-maker, and his helper were attempting to remove a grate out of the bottom of a fire-box of a locomotive standing in defendant's round-house, and the helper having let go his end of the grate, which fact was unknown to plaintiff, the plaintiff received a sprain of the right wrist, judgment for plaintiff in the Wyandotte District Court was *reversed*, it being held that the facts did not show any liability of the defendant for the accident.

Railroad employee injured — Mistake of surgeon in treatment — Railroad company not liable.

In *ATCHISON, TOPEKA & SANTA FE R. R. Co. v. ZEILER*, 54 Kan. 340 (July Term, 1894), action by the widow of a deceased brakeman in the railway company's service, to recover damages for alleged mistake of surgeon employed by the railway company to treat the injured employee, such mistake being alleged to be the cause of death of plaintiff's intestate, judgment for plaintiff was *reversed*, the railroad not being liable. The official syllabus states the case as follows:

"1. A railroad company which procures competent surgeons to attend a brakeman injured in its employ, and proceeds to transport him to a hospital, in pursuance of the advice and direction of such surgeons, and complies with all their directions as to his safety and care, is not liable for any mistake, error in judgment or want of foresight in such surgeons.

"2. The plaintiff's intestate had his leg crushed at Woodward, in the Indian Territory. By direction of a surgeon he was transported into Kansas. This action is brought to recover for improper treatment afterward received by him, no claim being made on account of the original injury. The jury, in answer to a special question, find that he died from the injury received in the Indian Territory, and consequent loss of blood. All that was done by the railroad company and its employees was under and in accordance with the direction and advice of competent surgeons, in whose selection there is no claim of want of care. *Held*, that the company is not liable for the death of the injured man." Opinion by ALLEN, J.

Collision — Death statute — Law of place.

HAMILTON v. HANNIBAL & ST. JOSEPH R. R. Co., 39 Kan. 56 (January Term, 1888), was an action for damages for death of plaintiff's husband, an inspector of supplies in the employ of another railroad company, caused by a collision of trains in the State of Missouri. The action was brought to recover under the Missouri statute relating to actions for damages for death in certain cases. The Supreme Court affirmed the ruling of the Atchison District Court that the petition did not state facts sufficient to constitute a cause of action under the laws of Kansas, and verdict directed for defendant was *affirmed*.

LOUISVILLE AND NASHVILLE RAILROAD CO. v. COLLINS.

Court of Appeals, Kentucky, September, 1865.

[Reported in 2 Duvall, 114.]

RAILROAD LABORER INJURED WHILE UNDER ENGINE— NEGLIGENCE OF ENGINEER—DUTY AND LIABILITY OF RAILROAD COMPANY—FELLOW-SERVANT— VICE PRINCIPAL— GROSS NEGLIGENCE.— Where a railroad laborer engaged to load and unload cars was required to assist in righting an engine which seemed to be out of order, and while under the engine, which was moved by the engineer, had his legs cut off, the railroad company was liable for the injury.

The syllabus to the official report states the points decided as follows:

1. When, on a question of negligence, the testimony is conflicting, the jury have a right to decide the character of the negligence.
2. Although the plaintiff, suing for an injury resulting from the gross negligence of the defendant, may have been guilty of negligence, if, nevertheless, the injury might have been avoided by the proper care of the defendant, such co-operating negligence of the plaintiff will not exonerate the defendant.
3. Railway companies are required by law to observe, at least, ordinary care, vigilance, and skill, so far as strangers are concerned, in operating their trains.
4. The responsibility of railroad companies for injuries resulting from the negligence or unskilfulness of its engineers, is graduated by the classes of the persons injured by the engineer's neglect or want of skill—as to strangers, ordinary negligence is sufficient—as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient.
5. Among common laborers, constituting a distinct class, no one of them, as between himself and his co-equals, is the corporation's agent; and it is not liable to any one of them for injuries resulting from the acts or omissions of any other one of the class, although each of the company's employees would be its agent as to entire strangers to it.

APPEAL from Warren Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

Robertson, J.— This appeal presents, for the first time, to the Appellate Court of Kentucky, a new and unsettled question, involving the legal liability of railroad companies for damages resulting to an inferior from the negligence of a superior employee, while engaged in different spheres of employment in the common service of any such corporation.

The appellee, while employed by the Louisville & Nashville Railroad Company, as a common laborer, in loading and unloading its burthen cars engaged in carrying for its road cross-ties and iron, was required, with a co-laborer of the same class, to assist its engineer in righting in Bowling Green, Kentucky, a locomotive which seemed to be out of order, and the steam being up, the front wheels jacked, the hind wheels unscotched, the engineer on top, and the appellee working, as ordered, beneath — the engine moved forward and cut off one of the appellee's legs, and that motion being reversed by the engineer, the other leg, also, was cut off.

For that irreparable loss, dooming him to hopeless poverty and dependence, the appellee sued the appellant for tort, and recovered a judgment for \$5,000 damages, as assessed by the jury.

The appellant denies that its engineer was guilty of culpable negligence, and insists, also, that, as he was competent and trustworthy, it is not responsible to his co-employee for his negligence, however gross.

The Circuit Court instructed the jury that, if they believed that the accident resulted from the *gross* negligence of the engineer, the appellant was liable for it in this action.

After full and careful consideration, we are satisfied that the engineer was guilty of some negligence. The degree of it was a question of fact which, on such apparently conflicting testimony, the jury had a right to decide, and, whatever deduction may be most logical and consistent, we are also satisfied that the circumstances, as detailed by all the witnesses, authorized the jury to find that his negligence was "*gross*," an elaborate analysis of all the facts would not, therefore, be either useful or pertinent in this opinion.

But the appellant assumes that the appellee's own fault contributed to the catastrophe, and it thereupon insists that the co-operation of even the gross negligence of the engineer will not sustain the action. The assumption is not sufficiently maintained, nor is the conclusion from it altogether unexceptionable or true.

The engineer does testify that he directed the appellee and his associate in the work to "block" the wheels, and says that such a precaution would have prevented the accident; but others, who heard all that was said, and saw all that was done on that occasion, do not corroborate, but, by strong implica-

tion, negatived his statement of that fact, rather discredited by the incredible omission, and by his failure to see that danger, so imminent in his opinion, was not averted by a security so obvious to him and so easy to them; and his credibility is also impaired by his interest and zeal, and his conduct in hiding himself and abandoning his post in the appellant's service, almost immediately after the infliction of the injury on the appellee; and not only may we presume that the appellee, a young and unskilled laborer, was ignorant of the utility of scotching, but feel sure that the engineer either did not advise or direct it, or was guilty of gross negligence in placing him in so much peril under the engine without seeing that its stationary attitude was first secured by blocking, and also in using no means of keeping down the steam or preventing its accumulation, although the appellee was kept under the locomotive more than an hour—the steam increasing and the wheels unscotched all the time.

But, had the appellee been guilty of negligence, nevertheless, the injury might have been avoided by the proper care of the engineer, and is, therefore, attributable to his gross negligence. In such a case, both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrong-doer from legal liability for the damage, which, without gross negligence, he could have prevented, and was as much bound by law to prevent in that as he would have been in any other case.

In running its locomotive and its passenger and burthen cars, a railway corporation is required by law to observe, at least, ordinary care, vigilance and skill, so far as strangers may be affected by the employment of a motive power so tremendous and destructive as unregulated or carelessly or unskillfully regulated steam; and, as in every class of cases of bailment or trust, the requisite care is proportioned to the danger of neglect and the difficulty of conservative management, ordinary care in many classes of cases might be ordinary neglect, and ordinary neglect might be gross neglect in steam operations on a railway. In all those operations, the invisible corporation, though never actually, is yet always constructively, present through its acting agents, who represent it, and whose acts, within their representative spheres, are *its* acts. Had the appellee been a stranger the appellant would, therefore, have been certainly suable and responsible in this action, and

we cannot admit that the appellee's relation as an employee in its service, should exempt the corporation from that general liability, as it might, perhaps, do by the application of a recent rule adjudged in England with some exceptions, and echoed, with still more exceptions, by a few American courts. But this anomalous rule, even as sometimes qualified, is, in our opinion, inconsistent with principle, analogy and public policy, and is unsupported by any good or consistent reason. In the use and control of the engine, the engineer is the chief and governing agent of the corporation, and all his associates *in that employment* are employees in "*a common service*." Neither of these subordinates under his control is, *as between themselves*, an agent of the railway company; and, therefore, *it* is not responsible for any damage done by one of them to another while in its service; and, so far, the British rule has foundation in both reason and analogy; but beyond this, it is baseless of any other support than a falsely assumed public policy or implied contract. In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior—the corporation. They have no authority to control or resist him in his allotted sphere of service; and why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his employer and constituent, for indemnity for damage resulting from his wilful wrongs or grossly negligent omissions? When they engaged to serve under him, perhaps, they knew nothing of his trustworthiness or his credit; but they knew that they would serve a corporation, and probably faith in *its* responsibility and protection induced them to venture into its service; and this faith may be presumed to include an assurance of safety as well as of pay. Perhaps, if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law would, therefore, rather seem to be that the subordinates should look to the corporation, and not to its agent alone, for indemnity for loss arising to them from his unskillfulness or culpable negligence.

Nor can we perceive how public policy could be subserved by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer's conduct; but why should they be left to depend on that which could be of

little, if any, avail to prevent the unskilfulness or negligence of a superior above their dictation or control?

In undertaking the perilous service, they might be presumed to risk the hazards necessarily incident to their employment; and, as they could not expect infallibility in the management of the locomotive and its running train, and, as they knew that the most faithful and skilful managers may occasionally lapse into common blunders and *ordinary* negligence, the law might imply an agreement to risk their possible occurrence. But the corporation, being under an implied obligation to provide sound and safe cars and engines and a competent and faithful engineer, his subordinates cannot reasonably be presumed to expect or to hazard his gross negligence which borders on fraud and crime; and it seems to us, therefore, that, while the corporation may not be responsible to them for his ordinary negligence, both justice and policy require that it should be held liable for his gross negligence as its chief and controlling agent in the management of its running train. Assurance of protection to this extent not only appears just and reasonable, but, by inspiring more confidence, would enable the corporation to obtain and keep better employees and at cheaper rates. This doctrine, therefore, instead of its converse, seems to be suggested by reason and commended by policy. But, in this respect, employees, like the appellee, in a distinct and altogether different department of service, stand in an essentially different category.

In their employment, having nothing to do with the cars or the running of them, they, like the corporation's mere wood-choppers, are comparative strangers to the engineer and his running operations, and seem to be entitled to all the security of strangers. They may be presumed to know no more than strangers about the skill or care of the engineer, nor have they any more control over him or connection with his running arrangements or operations. They are, therefore, not, in the essential sense of contradistinctive classification, "*in the same service*" with the engineer and his running co-operators, who act in a different sphere and constitute a distinct class; consequently, neither of the assumed reasons for the British rule as to employees "*in the same service*" can be, in any way, consistently applied as between the engineer and such common laborers as the appellee; and the apparent extension of the rule to them may be deemed inadvertent, or not carefully and

logically considered with rational discrimination and precision. We, therefore, can neither feel the *rationale*, nor acknowledge the authority of the crude and self-contradictory decisions, or loose and incongruous *dicta*, referred to on that subject; but, to harmonize the law, we must recognize a more congenial principle of normal vitality, and adjudge, as we now do, that the appellee, in his humble and isolated employment, should be treated as a stranger to the engine as a motive power, and if without fault himself, might, like other strangers, recover from the railway corporation for a loss arising from the ordinary negligence of its engineer; but, as the jury might possibly have found that he himself had been negligent, the Circuit Court was right in requiring proof of gross negligence by the engineer, which, in that contingency, would have been necessary to the liability of the appellant.

The only consistent or maintainable principle of the corporation's responsibility is that of agency. "*Qui facit per alium facit per se.*" It is, therefore, responsible for the negligence or unskilfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill — as to strangers, ordinary negligence is sufficient — as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross — but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power and engaged in a merely incidental, but independent service, no one of them, *as between himself and his co-equals*, is the corporation's agent; and, therefore, it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it.

This is the only doctrine we can recognize as consistent with the enlightened and homogeneous jurisprudence of this clearer day of its ripening maturity; and, looking through the mist of the adjudged cases and elementary *dicta*, we can see no other fundamental principle which can mould them into a consistent or abiding form. That principle is the only safe clue to lead the bewildered explorer to the light which shows the sure way of right, and proves the true doctrine of American law.

We feel authorized to conclude that the appellant was legally liable to the appellee for the injury done to him by the gross negligence of its engineer; that the court, on the trial, gave to the jury the true and only true law; and that the verdict was authorized by both the law and the facts; and we would overstep the judicial line by interfering with such a verdict in such a case, on the ground of alleged exorbitance, indicating neither passion, partiality nor prejudice.

Wherefore, the judgment is affirmed.

LOUISVILLE AND NASHVILLE RAILROAD CO. v. ROBINSON.

Court of Appeals, Kentucky, Winter Term, 1868.

[Reported in 4 Bush, 507.]

FELLOW-SERVANT—VICE-PRINCIPAL—RESPONDEAT SUPERIOR—GROSS NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BRAKEMAN INJURED IN COLLISION.—

1. The implied undertaking between a railroad company and its employees in the same class of service does not exonerate the company from liability for damages, resulting to one of such co-agents, from extraordinary or gross negligence of another of such agents, in the same line of service. The principles of the case of *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 114, 15 Am Neg. Cas., 138, *ante*, are adhered to without qualification.
2. Engineers and brakemen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakeman on a freight train, does not affect the reason and policy of implying, as between themselves, such associations, knowledge and trust, as to have induced an undertaking naturally to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert (1).

1. In *LOUISVILLE & NASHVILLE R. R. Co. v. FILBURN'S ADM'X*, 6 Bush, 574 (Kentucky Winter Term, 1869), an action by the administratrix of a deceased employee for punitive damages, under the Act of March 10, 1854 (2 Stanton, 510), judgment for plaintiff in the Jefferson Common Pleas for \$10,000 was reversed for erroneous instructions on wilful negligence, etc. The cases of *Louisville & Nashville R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*, and the sub-

sequent case of *Louisville & Nashville R. Co. v. Robinson*, 4 Bush, 507 (the case at bar), were cited on the ruling "that the implied undertaking of employees in the same service to risk the contingencies which the ordinary skill and care of each, in his line of service, could not avert, did not exempt the company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them."

It appeared in the *FILBURN* case,

3. Gross neglect is either an intentional, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which, in some respects, is *quasi-criminal*.
4. If the employee, or agent complaining of hurt, contributed to it, by his own negligence, he cannot recover damages from the railroad company, unless its co-operating agent, charged with gross neglect, could have avoided the impending damage, by the observance of ordinary diligence, notwithstanding the neglect of the complaining party.
(*Syllabus to official report.*)

APPEAL from judgment for plaintiff in the Jefferson Court of Common Pleas. *Judgment reversed.*

I. & J. CALDWELL, for appellant.

J. G. WILSON, for appellee.

Robertson, J.—This appeal is prosecuted for reversing a judgment in the appellee's favor against the appellant for \$5,000 on a verdict for that amount in an action for the loss of a leg by being run over by a locomotive engine and tender, in the yard of the depot at Bowling Green, Kentucky. There were three tracks in the yard, with switches for regulating the movements of trains and engines coming in and going out. The engine and tender which ran on the appellee belonged to the passenger train, and the appellee was brakeman on a freight train of the company. Being in the yard the appellee started on the central track to go out to the caboose of his freight train, and, while walking on that track, the engine and tender, on a signal given by the hand of the switchman, made a retrograde movement toward the appellee's back and ran on him. That movement was sooner than usual or necessary, and without any audible signal; but the steam was up when the appellee started on the track. It does not appear that either the engineer or switchman, when the movement was made, saw the appellee on the track, or had any reason to apprehend that he would continue on it.

This case must be ruled by that of *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 114 (1), to the principles of which this

supra, that "during a storm, which occurred on the night of March 16, 1868, a dead and partially decayed oak tree, which stood on the road-bed and near the track of the Louisville & Nashville Railroad, fell across the track, by which the engine of an ex-

press train, on its way from Nashville to Louisville, was thrown from the track, and Thomas Filbern, the engineer, was instantly killed."

1. See the *COLLINS* case, preceding case reported in this volume of *AM. NEG. CAS.* page 138.

court adheres without qualification. But, in one respect, the two cases essentially differ. Collins and the engineer, though employees of the same company, were, nevertheless, not in any way associated in the same kind of service; but the appellee and the engineer, in this case, were employed in the same running operations; and the fact that one served on a passenger and the other on a freight train, does not affect the reason and policy of implying, as between themselves, such associations, knowledge and trust as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. But this implied understanding between the company and its employees in the same class of service does not, as adjudged in the case of Collins, exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them. Gross neglect is either an intentional wrong, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which, in some respects, is *quasi-criminal*. But if the party complaining of hurt, by his own negligence contributed to it, he cannot recover damages from the company unless its co-operating agent, charged with gross neglect, could have avoided the impending damage by the observance of ordinary diligence, notwithstanding the neglect of the complaining party.

These are the principles recognized in Collins case, *supra*; and the court below, in giving and overruling instructions, tried to conform to them. But they were not so defined as to enable the jury to apply the law to the facts with reasonable certainty; and, tested by the true standard applied to all the facts, the second instruction given in appellee's favor was evidently erroneous in omitting all consideration of the question whether he was not guilty of contributory negligence in walking and continuing on the central track when he did; and whether, after the *locomotive car moved*, ordinary vigilance and care by the engineer could have prevented the collision.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

SULLIVAN'S ADM'R v. LOUISVILLE BRIDGE CO.

Court of Appeals, Kentucky, October, 1872.

[Reported in 9 Bush, 81.]

LABORER EMPLOYED IN BRIDGE CONSTRUCTION FALLING INTO RIVER AND DROWNED—LIABILITY OF CONTRACTOR—WILFUL NEGLIGENCE—DUTY OF MASTER TO FURNISH SAFE MATERIALS, ETC.—ASSUMPTION OF RISK—DEFECTIVE APPLIANCE—NOTICE OF DEFECT—CONTRIBUTORY NEGLIGENCE.—1. Under section 3 of the act of March 10, 1854 (Revised Statutes, 2 Stanton, 510), no recovery can be had in the absence of proof that deceased lost his life by reason of the wilful neglect of the company or its agents.

2. A contractor employing laborers in and about his work is liable to his employees for any injury sustained by them in the prosecution of the same, the injury being the result of his negligence or that of his agent.
3. The relation between employer and employee requires that the employer shall use ordinary care in the selection of materials to be used by the laborer in the course of his work, and to exercise this same degree of care and caution in the selection of those who are to control and manage his hands.
4. When the employer knows, or with the exercise of ordinary vigilance and care ought to have known, that the material furnished by him for the use of the laborer in the construction of the work was defective, and the latter by reason of this negligence is injured, he may recover of his employer damages by reason of the injury sustained. (Shearm. and Redf. on Neg., pp. 104-106; Saunders on Neg., p. 120.)
5. When the employee undertakes to perform labor that is necessarily attended with danger to himself he so far assumes the risks as to require the exercise of ordinary prudence and caution on his part.
6. The employee is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed and an injury occurs he can not look to his employer for damages upon the ground of negligence, if by the exercise of ordinary vigilance he could have avoided the accident.
7. The law implies that the laborer is to be furnished with proper and safe material for the execution of his work, and makes it obligatory on the employer to provide for his safety while engaged in its prosecution; but when the employee knows all about the material furnished, and, being fully aware of its defective and unsafe condition, voluntarily uses it and thereby sustains an injury, he is without remedy.
8. Where the employee, using the material furnished him and receiving an injury therefrom, knew before the injury was received as much about the material used and its defectiveness as the party furnishing it, the employer has not been held liable.
9. There are cases where the employee has the right to depend upon the judgment of his employer as to the safety of the material furnished him,

- and in such instances, when he is injured by the negligence of the party furnishing the material, his right to recover is unquestioned.
10. In this case the employee had been engaged for several days in working on the very plank from which he fell into the river, and, as the evidence shows, was aware of the danger, and at one time refused to go upon it; he not only had the means of knowing but did know the danger he was incurring, and voluntarily placed himself in a position where he lost his life, when by the exercise of ordinary care for his own safety he might have avoided it.
 11. It is not every act of contributory negligence that prevents one from maintaining an action for an injury received.
Such negligence will not prevent the plaintiff from recovering, unless for this negligence the injury would not have occurred, or if the defendant by the exercise of ordinary care could have avoided the consequences of plaintiff's negligence. (Saunders on Neg., 58.)
 12. Contributory negligence in this case was the want of ordinary care on the part of the deceased in protecting himself from danger. The court should have told the jury what contributory negligence was.
 13. If the defects were such as the company or its agents ought to have known, or by the exercise of ordinary vigilance could have known, the company is responsible. *Louis. & Nash. R. R. Co. v. Robinson*, 4 Bush, 509, 15 Am. Neg. Cas. 144, *ante*; *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 116, 15 Am. Neg. Cas. 138, *ante*; *Louis. & Nash. R. R. Co. v. Spence*, MS. Opinion.)
 14. Erroneous instructions are not prejudicial to the plaintiff when his own testimony fails to show a good cause of action. In this case the evidence failed to show that the death of plaintiff's husband resulted from the wilful negligence of the company or its agents.
(*Syllabus to official report.*)

APPEAL from Jefferson Common Pleas. The case is stated in the opinion. *Judgment affirmed.*

HARLAN & NEWMAN, for appellant.

BULLOCK, ANDERSON & WEISSINGER, for appellee.

Pryor, J.—The appellee, the Louisville Bridge Company, undertook to construct a bridge from the Kentucky to the Indiana shore across the Ohio river at the head of the falls. It was necessary, in order to the successful prosecution of the work, to erect cribs along the line of the bridge about six or eight feet square, to fill the same with rock and sink them to the bottom of the river. The company then constructed a temporary railway upon these cribs, so as to enable its hands to carry the stone and other material necessary to build the bridge. After the railway had been extended some distance into the river two planks, one upon the other, and estimated to be from nine to twelve inches in width, were placed, one end of them on a truck loaded with stone that stood on the rail-

way, and the other end on a covered flatboat that was anchored within a few feet of a crib that was being filled with stone. The distance from the truck on the railway to the flatboat was about ten feet. The planks were used so as to pass the stone from the truck on the railway to the crib that was being filled, and the hands employed for that purpose stood upon this plank and passed from one to the other the stone until it was thrown into the crib. The water directly beneath the planks on which the workmen stood was distant about five or six feet and running about fifteen miles an hour. The proof also shows that a skiff was tied at or near the upper end of the flatboat, and nearer the Indiana shore, for the safety of those employed in this hazardous labor.

John Sullivan had been employed by the company for some time, and while standing on the plank and passing (in connection with the other laborers) the rock from the railway to the crib, lost his balance by the giving way of a portion of a stone he held in his hand, fell into the river, and was drowned.

The appellant, Julia Sullivan, who is his widow, brings this suit, as the administratrix of her husband, against the appellee, the bridge company, alleging "that her husband while employed and engaged in obeying the orders of the company, and without any fault or carelessness on his part, was precipitated into the river and drowned; that his life was lost by reason of the wilful neglect of the company and its agents charged with the superintendence of the work in not making such preparations and using such precautions as were necessary and proper for the safety and security of her husband and other like employees engaged in and about said work, under their orders, directions," etc.

The answer of the appellee puts in issue the allegation of the appellant's petition, and upon the trial of the cause in the court below a verdict and judgment were rendered for the defendant (the appellee), and from that judgment this appeal is prosecuted.

The evidence in the cause establishes these facts: That John Sullivan, appellant's intestate, previous to the day on which he was drowned, had, with three or four others, been engaged in passing stone on the same plank. The foreman also stood upon it and passed the stone. One of the laborers refused to go upon the plank at all, and when Sullivan, together with others, hesitated about going on it, McKey, who was the fore-

man of the work, said to Sullivan and others, "Get on that plank and pass the stone along or go home." Then Sullivan, with others, went on it, and shortly after fell into the river. It is also in proof that a skiff was attached to the flatboat in order to insure the safety of those at work, and there is some testimony conducing to show that if this skiff had been fastened at the lower instead of the upper end of the boat, Sullivan might have been reached sooner and his life saved.

On this point, however, the evidence is conflicting, and the weight of testimony is that they were not longer than one minute in unloosing the skiff and getting it under way. One man falling with Sullivan was saved, and every effort made to rescue the latter. This mode of conveying the stone had been practiced by the company for some time, but after this unfortunate accident the platform was widened and made much more secure.

This action was brought under the third section of the act of March 10, 1854, entitled "An act for the redress of injuries arising from the neglect or misconduct of railroad companies and others" (Revised Statutes, 2 Stanton, 510), and reads as follows: "That if the life of any person is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the decedent shall have the right to sue such company, etc., and recover punitive damages for the loss or destruction of the life aforesaid."

It is conceded that no recovery can be had in the present action by the appellee, as the personal representative of her husband, in the absence of proof showing that he lost his life by reason of the wilful neglect of the company or its agents. Counsel for the appellee insists that, conceding all the facts proven to be true and the instructions erroneous, still no cause of action exists.

The essential questions presented by the argument in this case arise upon the instructions given by the court below; and, if erroneous, were they prejudicial to the appellant? The first instruction given at the instance of appellant's counsel, basing the right of recovery upon the alleged wilful negligence of the company, was right and proper, and its correctness is not questioned by counsel for the appellee. Many instructions were given and refused by the court, but we deem it unnecessary in determining the legal questions presented to

notice any more of them than the third and fourth instructions given at the instance of counsel for the appellee, as follows: "No. 3. That to entitle the plaintiff to recover in this action they must find from the evidence not only that the plank or other means used in the prosecution of defendant's work was defective and insufficient, and by reason thereof plaintiff's intestate lost his life, without any fault or negligence on his part contributing thereto; but they must also find that such defectiveness or insufficiency was known to defendant or its agents, and notwithstanding that knowledge they wilfully neglected to remedy the same." "No. 4. That if the jury find from the evidence that plaintiff's intestate, by his own fault, negligence, or want of care, contributed to bring upon himself the injury complained of, plaintiff cannot recover in this action, and the jury should find for the defendant."

A contractor employing laborers in and about his work is liable to his employees for any injury sustained by them in the prosecution of the same, the injury being the result of his negligence or that of his agent. The relation existing between the two requires that the employer shall use ordinary care in the selection of materials to be used by the laborer in the course of his work, and to exercise this same degree of care and caution in the selection of those who are to control and manage his hands. When the employer knows, or with the exercise of ordinary vigilance and care ought to have known, that the materials furnished by him for the use of the laborer in the construction of the work were defective, and the latter by reason of this negligence is injured, he may recover of his employer damages by reason of the injury sustained. (Shearm. and Red. on Neg., pp. 104, 105, 106; Saunders on Neg., p. 120.)

While this doctrine is fully recognized, it is equally as well settled that where the employee undertakes to perform labor that is necessarily attended with danger to himself he so far assumes the risks as to require the exercise of ordinary prudence and caution on his part. He is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed and an injury occurs, he cannot look to his employer for damages upon the ground of negligence, if by the exercise of ordinary vigilance he could have avoided the accident. The law implies that the laborer is to be furnished with proper and safe material for the execution of his work, and makes it obligatory on the employer to provide for his

safety while engaged in its prosecution; but when the employee knows all about the material furnished, and being fully aware of its defective and unsafe condition voluntarily uses it and thereby sustains an injury, he is without remedy.

In an examination of many authorities on this subject we have found no case where the employer, either from his own neglect or that of his agent, was held liable when the party using the material furnished him, and receiving an injury therefrom, knew before the injury was received as much about the material used and its defectiveness as the party furnishing it. In the case of *Williams v. Clough*, referred to by the elementary writers on this subject, the declaration would have been bad without an allegation of the want of knowledge on the part of the plaintiff as to the defect in the ladder; and, therefore, it was alleged "that the defendant was possessed of a ladder unsafe for use, and, knowing this fact, induced the plaintiff, who was in his employ, to carry corn up the ladder, and by reason of the defect therein, the same being unknown to the plaintiff, he fell and was injured." It was held that the plaintiff could recover; but we can well see how the action could have been defeated by proof, upon a proper issue made, that the plaintiff knew of the defect in the ladder as well as the defendant, and with that knowledge assumed the risks. [3 H. & N. 258.]

There are cases where the employee has a right to depend upon the judgment of his employer as to the safety of the material furnished him, and in such instances, where he is injured by the negligence of the party furnishing the material, his right to recover is unquestioned. In the present case the appellant's intestate had been in the employ of the company for many months: he had been employed for several days in working on the very plank from which he fell into the river; and, as the evidence shows, was aware of the danger, and at one time refused to go upon it. He not only had the means of knowing but did know the danger he was incurring, and voluntarily placed himself in a position where he lost his life, when by the exercise of ordinary care for his own safety he might have avoided it.

The skiff, as appears from the proof, was unloosed as soon as it was possible for the hands to reach it; and whether so or not, the cause of the unfortunate accident was the voluntary position assumed by the intestate on the plank from which he

fell. This want of ordinary care and caution on the part of the intestate, and the voluntary risks assumed by him, appears from appellant's own proof, and no recovery can be had, conceding the truth of all the facts proven in the case. If the facts proven presented a state of case that ought to have gone to the jury, we are not prepared to agree with counsel for the appellee that either of the instructions given at his instance contained the law of the case. It is not every act of contributory negligence that prevents one from maintaining an action for an injury received. Such negligence will not prevent the plaintiff from recovering, *unless* for this negligence the injury would not have occurred, or if the defendant by the exercise of ordinary care could have avoided the consequences of the plaintiff's negligence. (Saunders on Neg., p. 58.) The court should have told the jury what contributory negligence was, and not have left it in their power to say that it was either slight or gross negligence. They should have been told that it was the want of ordinary care on the part of the intestate in protecting himself from danger. Under the instruction given the jury might have believed that the company was guilty of wilful and reckless negligence, and still release it from liability, because the decedent had been guilty of slight neglect.

The third instruction says, in effect, that no recovery can be had in the case unless the company or its agent knew of the defective materials used, and wilfully neglected to remedy the defect. This instruction, as well as the fourth instruction, is in conflict with the principles of this opinion and the adjudications of this court in the cases of the *Louis. & Nash. R. R. Co. v. Robinson*, 4 Bush, 509, 15 Am. Neg. Cas. 144, *ante*; *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 116, 15 Am. Neg. Cas. 138, *ante*, and *Louis. & Nash. R. R. Co. v. Spence* (MS. opinion). If the defects were such as the company or its agent ought to have known, or by the exercise of ordinary vigilance could have known, the company is responsible. These instructions, however, were not prejudicial to the appellant, as her own testimony fails to show that the death of her husband resulted from the *wilful negligence* of the company or its agents. *This character of negligence* must be proved in order to make out a cause of action under the statute.

The judgment is affirmed.

LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD CO. v. CAVENS'S ADM'R.

Court of Appeals, Kentucky, June, 1873.

[Reported in 9 Bush, 559.]

LOCOMOTIVE ENGINEER KILLED IN COLLISION BETWEEN FREIGHT TRAINS—GROSS NEGLIGENCE—LIABILITY OF RAILROAD COMPANY—ASSUMPTION OF RISK—FELLOW- SERVANT—VICE-PRINCIPAL—RESPONDEAT SUPERIOR—

1. A freight train drawn by a defective engine, burdened beyond its capacity, fell behind its time near four hours on its way from Lexington to Louisville, and when endeavoring to ascend a grade near Lagrange at night, with no signals or lights behind, was run upon by an extra train which had been ordered from Midway to Lagrange by the train dispatcher of the company, whose duty it was to regulate the running of delayed and extra trains, no notice having been given to the extra train at any of the stations of the delay of the other. In the collision the engineer of the extra train was killed, without the fault of himself or any one on his train. *Held*, that the train dispatcher and the conductor of the freight train were guilty of gross negligence, and the company is liable to the personal representative of the deceased engineer in damages for the loss of his life.
2. Where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service, and this means only that he can not recover for any injury that his employer by the exercise of ordinary care and prudence could not provide against.
3. Where a number of persons contract to perform service for another, the employees not being superior or subordinate the one to another in its performance, and one is injured through the negligence of another, they are regarded as the agents of each other, and no recovery can be had against the employer.
4. But a subordinate in the same service can recover against the employer for the negligence of other employees who had the right and power to control and direct him, or who were his superiors with reference to the discharge of the duties pertaining to the work, or over whose actions he had no control or the right to advise. (Louis. & Nash. R. Co. v. Collins, 2 Duvall, 114; Louis. & Nash. R. Co. v. Robinson, 4 Bush, 507; Louis. Cin. & Lex. R. Co. v. Mahony's Adm'r, 7 Bush, 235.)
5. The employees of a railroad company controlling and directing the movements of one train must, with reference to those controlling another, be regarded as the agents of the company, and the company is responsible for injuries to a person of the one class resulting from the negligence of one of the other.
6. Phonographic report of testimony should not be sent to the jury without the consent of the parties.

(*Syllabus to the official report.*)

APPEAL from Jefferson Common Pleas. The case is stated in the opinion. *Judgment affirmed.*

PINCKNEY GREEN, BARNETT, EDWARDS & HARDING, L. H. NOBLE, for appellant.

PHIL LEE, D. M. RODMAN, JOHN M. HARLAN, for appellee.

Pryor, J.—James B. Cavens, while in the employ of the Louisville, Cincinnati & Lexington Railroad Company as engineer on a locomotive (freight engine) drawing trains between Louisville and Lexington, lost his life by reason of the collision of the train he was at the time running as engineer with another freight train owned by the company and running upon the same track. W. H. Cavens qualified as his administrator, and as such instituted the present action against the company, alleging that the death of his intestate was caused by the gross and wilful neglect of the company by its agents and servants, and asking exemplary damages under the statute authorizing a recovery in such cases. The allegations of the petition were traversed by the company and a trial had, resulting in a verdict for the plaintiff of \$8,000, upon which a judgment was rendered, and the case is now in this court for revision.

The regular freight train running between Louisville and Lexington at the time Cavens lost his life was under the control of Armstrong, as conductor, and left Lexington on the morning of the day the accident happened for Louisville at 7:15 A. M., and by its time-table was due at Midway at 8:45 A. M., Frankfort 10:27 A. M., Eminence 1:45 P. M., Lagrange 3:20 P. M., and Louisville at 7:35 P. M. This train on that day was behind time, so far as the proof shows, at all the stations after leaving Lexington, and instead of reaching Eminence at 1:45 P. M., did not reach that place until 5:36 P. M., making it behind its time when leaving there near four hours. After it left Eminence, and before reaching Lagrange, and at a point two and a half miles east of the latter town, in attempting to run up an ascending grade, either for the want of steam or on account of the incapacity of the engine, the train failed to ascend, and there remained on the track until it was run into by an extra train, on which the deceased was engineer, and Anderson conductor, running in the same direction, resulting in the loss of Cavens's life and much injury to others.

The train commanded by Anderson was an extra, or what is called by railroad men a *wild train*, running by no time-table, but required by the regulations of the road not to interfere

with the time of the regular trains. Anderson, the conductor on the wild train, had received on the evening of the day this accident happened a dispatch at Midway Station from the train-dispatcher at Louisville, containing the following order:

“To Anderson, Midway Station:

“Follow flag No. 12 from Midway to Lagrange. Make as fast time as is safe. Look out for Dodson, at work under a flag between Frankfort and Bagdad.

J. E. R., Train-dispatcher.”

This order was obeyed by Anderson by following flag No. 12 on the evening passenger train that left Lexington for Louisville; this flag was placed on the passenger train in order to notify all other trains it met or passed on the road that there was a train following after. There were telegraph stations at Frankfort, Bagdad, Eminence and Lagrange, and although this morning freight train, bound for Louisville, under the control of Armstrong as conductor, was behind time at Frankfort, Bagdad and Eminence, and had not reached Lagrange when due at that place by its regular time-table, five hours prior to the accident, and these delays all known at the office of the train-dispatcher at Louisville, as well as the fact that this wild train was then on its way to Lagrange under orders to run as fast as was safe, no information by telegraph or otherwise was given Anderson, the conductor, in order that he might avoid the impending danger. The telegraph agents both at Eminence and Lagrange had notified the train-dispatcher of these delays on the part of Armstrong's train.

It is urged by counsel for the appellant, based upon the testimony of the train-dispatcher, that it was not the duty of the latter to notify Anderson of his danger. It is immaterial, in our opinion, whether the train-dispatcher was required to give the information or not. If no such rule or regulation had been adopted by the company, with telegraph offices at nearly every station on the road, it evidences such a disregard for the safety of its employees, as well as those traveling upon its trains, as renders it inexcusable negligence. The evidence of the train-dispatcher, however, makes it clearly his duty to have given Anderson notice of the delay of Armstrong's train. He says that among the duties of a train-dispatcher “are those requiring him to give train-orders, running-orders to wild and extra trains and others that have no schedule time, and to give orders to delayed trains, arranging for meeting-points as he thinks

best." If these are the duties imposed by reason of his position, it is certainly incumbent upon him, when cognizant of the facts, to warn conductors when there is danger of colliding with other trains, or when by the exercise of even the slightest care and caution he ought to know that such danger exists.

It is not pretended that this train of Anderson's was encroaching upon the time of any other train, and certainly not of the train under Armstrong, as they were both running in the same direction, and when the accident occurred Armstrong's train was five hours behind time. It is also insisted by the company, based upon the same testimony, that the only means Anderson had of knowing that Armstrong's train was in his way was by seeing it upon the track, or by the signals given, or by making inquiry of persons at the various stations. If this inquiry had been made by Anderson at either Frankfort, Bagdad, or Eminence, the response would have been that Armstrong's train was at least an hour in advance of him, as such was the case, and he would have felt entirely secure in making the speed required of him by the order; hence the necessity of communicating to Anderson the facts so essential to the safety of his train and those upon it, and the discharge of so plain a duty would have saved the life of the unfortunate engineer.

It was also Armstrong's duty to have given the proper signals by placing torpedoes on the track, and also red lights, in order that the coming train might be advised of danger. This he recklessly failed to do, and the weight of the testimony conduces strongly to show that although he had been endeavoring to make his way up this ascending grade with his train for about one-half hour, still during this whole time no precautions were used to warn Anderson of the danger until his train was heard coming, and before Armstrong could get from the front to the rear end of the train, having thirty cars attached to his engine, Anderson's train was too near for any signal to have prevented the unfortunate occurrence.

It also appears that the engine belonging to Armstrong's train was defective, and had been in such condition for a long time, and, although attempting to pull thirty heavily laden cars up this ascending grade, had only the capacity to pull twenty-two.

After a careful consideration of all the testimony in the case, we are well satisfied that the death of appellee's intestate was caused by the reckless and wilful negligence of the agents

of the company and those in its employ. We shall not allude to the question of the alleged contributory negligence on the part of Anderson or those under him farther than to say that, in our opinion, there is an entire absence of proof showing that they contributed to bring about the injury complained of.

It is insisted by counsel for the company that, as the employees in this case were in the discharge of a common service, and occupying a like position, by which each was enabled to exercise the same rights and powers, that as between each other they were not the agents of the company, and, therefore, it is not liable for injuries to the one resulting from the negligence by the other while in the discharge of this service. While the legal proposition thus presented has been argued with much force, still we cannot perceive how the principle can be made applicable to the facts of this case.

It is well settled that where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercises of ordinary care and prudence, could not provide against. And it is equally as well established that where a number of persons contract to perform service for another, the employees not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. A different rule, however, prevails where the employment is several, and where one is subordinate to the other, or occupies such a position in the service with reference to his co-laborer as precludes him from having any control over his actions, or the right to advise even as to the manner in which the service or labor is to be performed. Public policy requires that where the laborers are co-equals, and engaged in laboring in the same field or on the same railroad train or in any other employment, that each should exercise proper care in the conduct of the business, and look to it that his co-laborer does the same thing; and when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution.

This was the reasoning of the court in the cases of *Murray v.*

R. R. Co., 1 McMullen (S. C.), 235; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. (Mass.) 49, and in many other American as well as English cases. The rule was carried so far in some of these cases, and particularly in the case of *Murray v. R. R. Co.*, *supra*, as to deny the right to recover, notwithstanding the party injured was a mere subordinate in the service to those causing the injury.

This extension of the rule was discarded by this court in the case of the *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 117, 15 Am. Neg. Cas, 138 *ante*, "as inconsistent with principle, analogy, and public policy," and the rule established that a subordinate in the same service could recover for the negligence of the agents who had the right and power to control and direct him, or who were his superiors with reference to the discharge of the duties pertaining to the work. The law will not imply, as was argued in that case, that the subordinate undertook upon entering the service to look alone to another employee, whom he had no authority to control or resist in any way, for damages resulting from the neglect of such employee while in the discharge of his duties.

The important question in the present case is, can the company be made liable for the negligent conduct of Armstrong or those upon his train? The maxim *respondet superior* certainly applies to the negligence of the train-dispatcher, as he had the control of all the officers on both trains; but as the negligence of Armstrong was considered by the jury upon the instructions given, it becomes necessary to determine the liability of the company for his acts. We do not understand that appellee's intestate is seeking to recover for the negligence of the engineer on Armstrong's train, but for the negligence of Armstrong himself. The latter had the sole power as between himself and his engineer to control the movements of the train. Upon his ordering it to move off or stop, it became at once the duty of the engineer to obey, and to this extent at least the engineer was a subordinate employee. It was also the duty of Armstrong, the conductor, and not that of the engineer, to place signals upon the track, or have it done, in order to avoid the danger, and to give such signals as in his judgment were necessary for the safety of the trains. No one on the train had the right or power to control or resist his action in this regard. Can it then be maintained that, as the decedent was an engineer upon one train and lost his life by reason of the

negligence of a conductor on another train, that his personal representative cannot recover for the reason that there was an engineer on the train controlled by the conductor whose negligence caused the misfortune, or because the officers of both trains were all clothed with similar powers? Such a ruling, in our opinion, would not only be contrary to public policy, but inconsistent with principle and authority. Assuming, however, that there is no distinction between the offices of conductor and engineer, and that appellee's intestate and Armstrong were performing the same duties for the company, but upon different trains, still the company is liable for this wilful neglect of Armstrong.

Appellee's intestate undertook to serve the company on the train of Anderson, or to act as engineer upon such trains as might be required by the company. He was placed where he had no power to control, advise with, or resist the acts of Armstrong, and was unable to know what orders had been given the latter as to the movements of his train, or the skill and prudence with which these orders were obeyed; he had no voice in his employment, or the right to determine his skill and judgment in its exercise. Is it not more reasonable to make the company, whose duty it is to employ careful and skilled agents for the conduct of its business, and when it alone controls such agents, liable for this neglect of duty, than to adjudge that a mere subordinate who has no means of knowing the qualification of the agent for such a position or voice in his selection as such, and without the means or power to resist or control his action, is without remedy, except as against the party committing the negligent act? If Cavens had been on the same train with Armstrong, and in a condition, by reason of his equality with him as an employee, to watch over and provide against his negligence, the reasons then for refusing to make the company liable would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist, and in such cases those controlling and directing the movements of one train with reference to those upon another and different train must be regarded as the agents of the company. The wisdom and justice of this rule are plainly demonstrated by the facts of the case before us. *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*; *Louis. & Nash. R. R. Co. v. Robinson*, 4 Bush, 507,

15 Am. Neg. Cas. 144, *ante*; Louis., Cincinnati & Lexington R. R. Co. v. Mahony's Adm'x, 7 Bush, 235 (1); Cleveland, Columbus & Cincinnati R. R. Co. v. Keary, 3 Ohio St. 201; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Cooper v. Mullins, 30 Ga. 115, 14 Am. Neg. Cas. 114.

The appellant was not prejudiced by the refusal of the court to send the phonographic report of Brown's testimony to the jury-room, and ought not to have permitted it without the consent of counsel or the parties litigant.

The instructions of the court below being in accordance with the principles herein recognized, the judgment of that court must be affirmed.

BRAKEMAN INJURED COUPLING CARS—RESPONDEAT SUPERIOR—FIREMAN ACTING AS ENGINEER—GROSS NEGLIGENCE OF CONDUCTOR.—In **LOUISVILLE & NASHVILLE R. R. CO. v. MOORE**, 83 Ky. 675 (*January Term, 1886*), brakeman injured while coupling cars, judgment for plaintiff in the Hardin Circuit Court for \$9,000 was *affirmed*. WM. LINDSAY and WM. WILSON appeared for appellant; W. P. THORNE and J. BARBOUR, and MONTGOMERY & POSTEN, for appellee. The facts of the case are stated by HOLT, J., as follows:

"The appellee, J. M. Moore, while in the employ of the appellant, the Louisville and Nashville Railroad Company, and when engaged upon a local freight train, was, while attempting to make a coupling, caught between the cars, and one of his feet and legs so injured as to necessitate its amputation.

1. In **LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO. v. MAHONY'S ADM'X**, 7 Bush (Ky.). 235 (*Summer Term, 1870*), judgment for plaintiff for \$4,000 was *affirmed*, the facts of the case being as follows: "John Mahony, a laborer, employed by the Louisville, Cincinnati and Lexington Railroad Company, to accompany one of its construction trains, and work in the loading and unloading of its cars used in constructing the branch of the road terminating at Covington, having been killed by an accident to the train which occurred on the morning of February 11, 1869. this action was brought by the appellee, his widow, who became his administratrix, for the recovery of punitive damages against the corporation, under the provisions of the Act of March 10, 1854 (2 R. S. 510), for alleged wilful neglect of the agents of the company, resulting in the death of Mahony."

On the question of punitive or exemplary damages it was held proper to admit evidence as to the condition of the family of the deceased and the pecuniary ability of the railway company. It was also held proper to admit testimony as to life expectancy of the deceased by reference to a recognized American life-table. Citing *O'Donnell v. O'Donnell*, 3 Bush, 216 and *Alexander v. Bradley*, 3 Bush, 667.

"The train consisted of the locomotive and tender, and either twenty-two or twenty-three freight cars; the crew, of a conductor, engineer, fireman, and three brakemen; and of the latter the appellee was the head one. The train had been side-tracked, and then cut in two at the crossing of a road, to enable travelers to pass. The 'live portion' of it consisted of a locomotive and three cars; the 'dead portion' of probably nineteen cars, and the space between the two portions was about fifty or sixty feet. A short distance down the side-track, beyond where the train had been thus halted, was a barrel of flour to be taken on board; and to save backing down after it the other two brakemen went after it. The testimony tends to show that they had only brought it a part of the way, and that one of them had returned, and gotten upon a car of the dead portion of the train when the accident occurred. After the train had been thus side-tracked for an hour, the conductor started toward the telegraph office, which was near by, and where the engineer already was; and as he did so, he ordered the appellee, Moore, to couple the train. The latter, in obedience to this order, went to the end of the dead portion of the train nearest to the live portion, and the latter backed against the former with great and unusual force, the fireman alone being upon the engine and operating it. The evidence shows that he was but a boy — at least only twenty years old, and inexperienced. So far as the record discloses, he had never before worked an engine. When the live part of the train struck the dead portion of it, it ran back about one hundred yards, either from the force of the two coming together, or else because the fireman, without waiting to see if the coupling had been properly and safely made, kept on backing the train. He testifies that he continued to back the train because one of the brakemen, but not the appellee, signaled him to do so; and if so, it is probable that it was the one who had returned from the trip for the flour.

"It is evident, however, that the two portions of the train came together with great force. The appellee had gone between them to make the coupling; to save himself he caught hold of the step-ladder upon the side of the box-car next to him, and which was a part of the dead portion of the train; but the wheel of the other car caught his foot, and it was cut off and he was dragged back with the train, and his leg ground and broken off, piece by piece, and wrenched from the knee socket, and portions of the bone left along the track.

"He brought this action, not by virtue of any statute, but under the general law, to recover damages upon the ground that the injury resulted from the wilful and gross neglect of the company's employees in charge of the train. A special verdict was rendered, by which the jury fixed the entire damages at nine thousand dollars, of which eight thousand dollars were given as compensatory and one thousand dollars as exemplary." * * *

The points decided are summarized in the syllabus to the official report as follows:

"1. The master is liable for an injury to one servant by the neglect of another, although they may be engaged in the same common employment, provided the negligent one is superior to or in control of the injured one.

"A railroad company is liable for an injury to a brakeman caused by the wilful or gross neglect of the conductor or engineer in charge of the train.

"2. Where it is the custom of a railroad company to permit the fireman upon its trains to act as engineer in coupling and switching the trains he is, when so acting, to all intents and purposes, the engineer of the train, and not the common equal fellow-servant of the brakeman, and the rule of *respondeat superior* applies where a brakeman is injured by his negligence.

"3. It was gross negligence in the conductor of a train to permit an inexperienced fireman to be in charge of the engine while a coupling was being made by a brakeman in obedience to his order. The brakeman had no right, before proceeding to obey the order, to demand information as to who was to engineer the train, but he had the right to expect that it would be done by the proper person, or one reasonably competent to do so.

"4. A verdict for nine thousand dollars was not excessive for the loss of a leg in this case."

LOUISVILLE AND NASHVILLE RAILROAD CO. v. MITCHELL.

Court of Appeals, Kentucky, January Term, 1888.

[Reported in 87 Ky. 327.]

BRAKEMAN INJURED WHILE COUPLING CARS—GROSS NEGLIGENCE — PLEADING — SPECIAL FINDINGS — DAMAGES — INTERROGATORIES—EVIDENCE.—Where a brakeman was engaged in coupling freight cars under the direction of the conductor, and before he had time to get from between the cars, the train was moved by direction of the conductor, and the brakeman was knocked down and his foot crushed, the railroad company was liable. The points decided are summarized in the syllabus to the official report as follows:

1. In a common-law action for negligence, the degree of negligence, whether wilful, gross or ordinary, need not be stated. It is a matter of proof and not of averment.

In this case, under a general averment of negligence, the question whether the injury was caused by *gross* negligence was properly submitted to the jury.

2. The special findings of a jury, like a general verdict, cannot be disturbed

upon the ground that they are against the weight of the evidence, unless they are flagrantly so.

3. The absence of slight care in the management of a railroad train is *gross* negligence.
- It was the duty of the conductor of a train to see that there was no new movement of the train while the brakeman was making a coupling under his direction, and he was guilty of gross negligence in failing to see that no such movement took place.
4. The finding of gross negligence authorized the finding of exemplary damages. The jury, however, were restricted to compensatory damages, of which the company of course cannot complain.
5. It is only when the damages assessed by the jury are glaringly excessive, and appear at first blush to have resulted from passion or prejudice, that the court can set aside the verdict upon that ground. Every verdict should be regarded *prima facie* as the result of the exercise of an honest judgment upon the part of the jury.
- As the evidence in this case shows that the plaintiff has suffered beyond estimate, his life for weeks hanging in the balance; that he is a cripple for life, disabled from earning a living, at least at his accustomed employment, if not altogether, and in a large measure deprived of the enjoyment of life, a verdict awarding (\$10,000) ten thousand dollars as compensatory damages, will not be set aside upon the ground that it is excessive.
6. Special interrogatories propounded to the jury are not open to the objection that they are improperly leading and suggestive, merely because their form indicates to the jury how to find in order to authorize a judgment for the one party or the other.
7. The court did not err in refusing to direct the jury to find whether the injury was the result of an accident. It was not a question of accident under the pleadings, but whether the defendant had been guilty of gross neglect, or the plaintiff of such negligence that but for it the injury would not have happened.
8. Whether evidence that the plaintiff had a family was competent in this case is not necessary to determine, as such evidence, if incompetent, was not prejudicial, the jury being restricted in estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such neglect, the bodily and mental suffering (if any) resulting directly from such injuries, and the impairment of capacity (if any) to labor and enjoy life resulting also from said injury."
9. If an erroneous step or instruction in a case be corrected by a subsequent instruction or otherwise, no ground for reversal exists.

APPEAL from Jefferson Common Pleas. The case is stated in the opinion. *Judgment affirmed.*

WM. LINDSAY and BARNETT, NOBLE & BARNETT (of counsel), for appellant.

BROWN, HUMPHREY & DAVIE, for appellee.

Holt, J.—The appellee, Robert S. Mitchell, while in the employ of the appellant as a brakeman, and when engaged in

the hazardous work of coupling some freight cars in the presence of and under the direction of the conductor, was caught by the wheel of one of them, and his ankle and foot so crushed that it had to be amputated. His theory as to the manner of the injury is, that after making the coupling, and before he had time to get from between the cars, there was a new movement of the train under the direction of the conductor, by which he was knocked down and injured. The company, upon the other hand, claim that there was no new movement of the train; that it backed slowly and properly to the car that was to be coupled to it; that the appellee went between them and made the coupling, and then, instead of coming out at once, walked between the two cars for three or four steps as they continued to go backward some six or eight feet from the force of the movement that was necessary to make the coupling, and in this way was caught and injured.

The company now object to the judgment of \$10,000 that was rendered upon the special verdict, upon several grounds.

The petition, after setting forth the manner and extent of the injury, avers that "the said action of said defendant's conductor in charge of said train, and the action of defendant in regard to said operating of said train, was negligent and careless, and the defendant was guilty of negligence, and the said injury to the plaintiff occurred by reason of the negligence and want of reasonable care on the part of defendant, and without any fault of the plaintiff."

The degree of the imputed negligence is not stated, at least in express language. Waiving the question whether this may not be done, and whether it is not done in this instance, by the statement of the manner of the injury, we are of the opinion that the use of the generic word "negligence" in the pleading, in an action of this character, is sufficient without averring its degree.

This is not an action under the statute for a killing by "wilful" neglect. If it were, it would have been necessary, inasmuch as the statute creates and defines the injury, to allege that the negligence was wilful; but it is one at common law for negligence. In such a case, the degree, whether wilful, gross or ordinary, need not be stated. It is a matter of proof and not of averment. It is said in *Chitty* that a general averment of negligence authorizes proof of gross negligence. (2 *Chitty* on Plead., *358, note e.)

In Abbott's Trial Evidence, page 583: "Gross negligence may be proven under a general averment of negligence."

Another writer uses this language: "The declaration must aver the negligence or default of the company; but it need not describe the kind of negligence, or particular acts which constitute the default, or the names or positions of the servants by whose fault the injury was inflicted." (Pierce on Railroads, p. 393.)

Newman, in his work on Pleading and Practice, page 415, says in substance, that where a statute creates and defines an injury by neglect, its particular degree must be averred in the language of the statute or in equivalent words; but that in other cases the general allegation of negligence will be sufficient, as it "in general includes gross as well as ordinary negligence."

Many cases might be cited in support of these text-writers. Among them are *Nolton v. Western Railroad Corp.*, 15 N. Y. 444, and *Turnpike Co. v. Maupin*, 79 Ky. 101.

The last-named case was for an injury sustained by reason of a defect in a bridge of the company, and the court in its opinion says: "The allegation of negligence is sufficient to entitle the plaintiff to recover in an action like this for any degree of culpable negligence that may be established by the evidence."

Why should not the general allegation of negligence authorize proof of gross negligence, where its existence is necessary to a recovery, equally with evidence of slight or ordinary neglect in a case where it is sufficient? Each are but subdivisions of it, and equally embraced by the term.

There is some evidence that the injury to the appellee resulted from gross neglect; the pleading authorized its admission, and as its existence was necessary to a recovery, the question was properly submitted to the jury whether the injury was thus caused.

The company contends that the interrogatories submitted to the jury were suggestive and calculated to induce responses favorable to the appellee; that the court improperly refused to let them say whether the injury resulted from an accident which could not have been guarded against by the exercise of ordinary prudence upon the part of the trainmen; that it failed to inform them that the burden rested upon the appellee not only to show the company's neglect, but his own freedom from any negligence; that some of the material findings are unsup-

ported by the evidence, and that the damages awarded are excessive, resulting in part at least from the improper admission of evidence that the appellee had a family.

The jury, in answer to the interrogatories, found that the appellee, when coupling the cars, was acting under the orders of the conductor; that when the coupling was made there was a momentary check of the train, but that it was in motion when the appellee was hurt, and that the conductor, by signal, caused the train to move on before the appellee had reasonable time to get from between the cars; that the gross negligence of the conductor in controlling the train caused the injury, and that he failed to use such caution as an ordinary prudent person would have used under like circumstances; that the exercise of ordinary care by the appellee would not have avoided the injury, and that \$10,000 in damages would reasonably compensate him for the mental and bodily suffering and the impairment of his capacity to labor and enjoy life arising from it.

It is insisted for the company that the findings, that there was a new movement of the train; that the injury resulted from gross negligence upon the part of the conductor, and that the exercise of ordinary care by the appellee would not have averted it, are altogether unsustained by the evidence. Whether this is so, and whether the verdict is so excessive as to warrant the intervention of an appellate tribunal, are the main questions to be considered.

The special findings of a jury, like a general verdict, cannot be disturbed upon the ground that they are against the weight of the evidence, unless they are flagrantly so.

The appellee testified, in substance, that by the direction of the conductor, and in his presence, he went between the cars to make the coupling; that after doing so, and before he had time to get out, he was injured by a new movement of the train. If this be true, the conductor was certainly chargeable with gross negligence. He was immediately present; he was controlling the train; he knew the appellee had gone between the cars by his orders to make the coupling, and that a new movement of the train would imperil his life. Under such circumstances it was his duty to see that it did not take place. Certainly, the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence. The conductor would not, for fear of injury to his own person, have

permitted a new movement of the train if he had occupied the appellee's position. To permit it under the circumstances was an absence of all care. It is true several other witnesses testify that there was no new movement of the train, but that merely the motion of the train necessary to make the coupling carried it backward a few feet. In fact, we are inclined to think that some of the findings are against the weight of the evidence, as it appears to us in the record; but they are the conclusions of twelve men who heard and saw the witnesses; and we cannot say that they are flagrantly so, especially in view of the fact that they have been approved by the trial judge, before whom the witnesses also testified.

The evidence fails to show that the negligence, which must be imputed to the company, was accompanied by any act of wilfulness. The jury, however, found it to be gross; and this authorizes the finding of exemplary damages. *Louis. & Nash. R. Co. v. McCoy*, 81 Ky. 403, 11 Am. Neg. Cas. 626 (1).

The jury were, however, restricted by the court to those which are compensatory only; and of this the company can not, of course, complain. The amount allowed seems large. It is so. The fact, however, that it appears high to us does not authorize a reversal. We are not acting as a jury, and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy of the law, and reasonably and necessarily so. It is difficult, indeed impossible, to measure with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of a jury as the best means of arriving even approximately, and every verdict should be regarded *prima facie* as the result of the exercise of an honest judgment upon their part. Any other rule would soon burden this court with numberless appeals upon this ground (2).

1. In *LOUISVILLE & NASHVILLE R. Co. v. McCoy*, 81 Ky. 403 (September Term, 1883), brakeman injured coupling cars, judgment for plaintiff for \$7,593.50, was reversed for erroneous instructions on negligence and gross negligence. See full report of the *McCoy* case in 11 AM. NEG. CAS. 626.

2. On the question of excessive damages see the following cases:

In *JACOB'S ADM'R v. LOUISVILLE & NASHVILLE R. R. Co.*, 10 Bush (Ky.), 263 (Summer Term, 1874), it appeared that "Presley Jacobs, who styles himself administrator of James W. Jacobs, deceased, sued the Louisville and Nashville Railroad Company to re-

The evidence shows that the appellee has suffered beyond estimate. For weeks his life hung in the balance. He is a cripple for life; doomed to hobble about during the balance of his days, disabled from earning a living, at least at his accustomed employment, if not altogether, and in large measure deprived of the enjoyment of life. In estimating the damages for all this different minds may well arrive at different results; and in view of the well-established rule upon this subject the verdict of the jury cannot be disturbed upon the ground that it is excessive.

The interrogatories objected to are in form as follows:

"4. Did or not the conductor (Sterling), whilst the plaintiff was coupling the cars and before he had reasonable time to complete the same and come from between the cars, cause, by order or signal, the train to start in motion, and thereby catch the plaintiff between the cars, and cause the injury to the lat-

cover damages for the alleged careless, negligent, wrongful and unlawful killing of his intestate. A trial was had in the Larue Circuit Court, resulting in a judgment for the plaintiff for \$150,000 (one hundred and fifty thousand dollars) in damages. A new trial was awarded, and upon the second trial arose the question that will be first considered." (See opinion by LINDSAY, J.) The question related to the denial by defendant that plaintiff was the administrator of the intestate, and points of practice were discussed. It was held error for the trial court to refuse plaintiff to submit a certain court order to establish his claim that he was the administrator, and it was error to give peremptory instruction to find for defendant. It was held, also, that punitive damages could only be awarded where the negligence of the defendant is wilful, *quasi*-criminal. An allegation that defendant "carelessly, negligently, wrongfully and unlawfully" ran its cars over the plaintiff's intestate does not amount to an allegation of wilful negligence, and the recovery could, therefore, only be for

compensatory damages. Judgment for defendant *reversed* and new trial awarded.

In *LOUISVILLE & NASHVILLE R. R. Co. v. Fox*, 11 Bush (Ky.), 495 (1875), passenger injured in derailment of car, judgment for plaintiff for \$35,500 was *reversed*, for excessive damages. The injuries sustained were: right ankle and foot crushed necessitating amputation, left leg also injured, and mental suffering from apprehension of being burned to death by one of the cars catching fire; there was also loss of baggage. The evidence tended to prove baggage loss was \$500, and expenses of cure of injuries amounted to \$5,000. The court (per COFER, J.,) discussed and cited numerous cases on damages (see opinion, pages 510-514). The briefs of the learned counsel for appellant (RUSSELL HOUSTON and T. & J. CALDWELL & WINSTON), and for appellee (T. W. GIBSON, GIBSON & GIBSON, JOHN M. HARLAN, and HARLAN & WILSON) also cited numerous cases on the question of damages. The case was tried in the Jefferson Common Pleas.

ter?" "Answer. We of the jury say that the conductor did, by signal, cause the train to move on before the plaintiff had reasonable time to come from between the cars."

"5. Was or not the injury to the plaintiff caused by the negligence or want of care on the part of the conductor (Sterling) in controlling or directing the movements of the train at the time?" "Answer. We of the jury say, yes it was."

"5½. If they answer question five in the affirmative, then they will say whether such neglect on the part of the conductor was gross neglect or ordinary negligence?" "Answer. We of the jury say it was gross negligence."

"5¾. Did or not the conductor (Sterling), at the time of plaintiff's injury, fail to use that kind of care and caution which an ordinarily prudent and skilful person engaged in like business would have observed under similar circumstances?" "Answer. We of the jury say, he did fail."

"6. Could or could not the plaintiff, by the use of ordinary care and prudence on his part at the time, have avoided said injury?" "Answer. We of the jury say, he could not."

"7. If the jury answer question No. 4 in the negative, question 5 in the affirmative, question 6 in the negative, and say in answer to question No. 5½ that said conductor was guilty of gross negligence, then they will consider, and say in answer to this question, what sum in damages, within that claimed, will reasonably compensate plaintiff for the injuries sustained by him, because of said negligence; the bodily and mental suffering (if any) resulting directly from said injuries, and the impairment of capacity (if any) to labor and enjoy life, resulting also from said injury. If, however, said questions 4, 5 and 6 are not answered as herein set forth, then this, the seventh question, need not be answered." "Answer. We the jury find for the plaintiff in the sum of ten thousand dollars."

It is urged that they pointed out to the jury how to find a verdict that would sustain a judgment for the appellee. It may be equally said that they informed the jury how to find, so as to authorize one for the company. As to the last interrogatory, it may be said that it would be difficult, if not impossible, to frame a hypothetical question so that a jury of ordinary intelligence would not know how to find, to authorize a judgment for the one party or the other.

Certainly it would be impossible to submit interrogatories of such a form that the attorneys could not point out to the

jury how they desired them to answer them to authorize a judgment for their client. If such a thing were possible, the jury would be unable to act intelligently. We must presume that they hunt for the right and not the wrong; and in our opinion the interrogatories are not open to the objection that they are improperly leading and suggestive.

The court, by its instructions, properly defined what would constitute gross and ordinary negligence upon the part of the conductor, and what would be ordinary care upon the part of the appellee; and the interrogatories must be read in the light of these instructions.

The jury were not only required to find specially whether the appellee had been guilty of any negligence, but were informed that the burden of proof rested upon him, and that he must make out his case by the weight of the testimony. It was not a question of accident under the pleadings, but whether the company had been guilty of gross neglect, or the appellee of such negligence, that but for it the injury would not have happened. This was the issue, and it was proper to shape the interrogatories with a view to its determination, and not of some question not presented.

In the case of *Louis. C. & L. R. R. Co. v. Mahony*, 7 Bush, 238, 15 Am. Neg. Cas. 161, *ante*, evidence that the injured party had a family was held to be competent. That was an action, however, under the statute, for a killing by wilful neglect. In actions for injuries for neglect not based upon such a statute, and where compensatory damages only are allowable, the authorities are to some extent conflicting as to the competency of such evidence.

In the case of *Winters v. R. R. Co.*, 39 Mo. 468, it was decided that it was competent to prove that the injured party had a family, not as a fact in itself authorizing damages, but as showing his condition and situation in life by way of estimating the damages done to him. Upon the other hand, this was denied in the case of *Pitts., Ft. W. & Chicago R'y Co. v. Powers*, 74 Ill. 341, 14 Am. Neg. Cas. 365*n*, upon the ground that it would tend to unduly enhance the damages and beyond compensation; that the only question is, how much has the plaintiff been damaged; and if such evidence be admissible, then it would be equally proper to show that the wife was blind, or the daughter an invalid.

It was, however, held by the Supreme Court of the United

States, in the case of *Penn. Co. v. Roy*, 102 U. S. 451, that evidence as to the poverty of the injured party, or whether he had a family, was inadmissible where he was entitled to compensatory damages only. This left the question open, so far as that court is concerned, in a case where an injury results from gross neglect, unaccompanied by wilfulness or acts of aggravation.

In the case now in hand the petition avers that the appellee has a family. It is specially pleaded.

It is held in some cases, as in *Laing v. Colder*, 8 Pa. St. 479, 10 Am. Neg. Cas. 144, that matters are naturally attendant upon the act, but proper by way of special damage, as that the injured party is the head of a family, may be proven, if specially pleaded. Mr. Rorer, in his work on Railroads, vol. 2, p. 1099, appears by the citation of authority to support this view.

It is not, however, necessary in this case to decide whether such evidence is competent in a case where an injury results from gross neglect, which authorizes exemplary damages, but which is unaccompanied by any act of wilfulness or oppression, or whether it is admissible in support of such matter when specially pleaded, because, in this case, the jury were, by the seventh interrogatory, expressly restricted in estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such negligence; *the bodily and mental suffering (if any) resulting directly from such injuries; and the impairment of capacity (if any) to labor and enjoy life resulting also from said injury.*"

This question enumerated the elements for the calculation of the damages, thereby withdrawing from the consideration of the jury the evidence as to the family as effectually as if it had been done by express instruction. (*R. R. Co. v. Shipley*, 31 Md. 368.) It was not a general verdict; but the finding as to damage was upon a special question, that pointed out to the jury what they should consider in fixing it.

We cannot presume they did not follow it; and if an erroneous step or instruction in a case be corrected by a subsequent instruction or otherwise, no ground for reversal exists.

Judgment affirmed.

BRAKEMAN INJURED IN COLLISION — SPECIAL AND GENERAL VERDICTS — PRACTICE. — In **WITTY v. CHESAPEAKE, OHIO & S. W. RY CO.**, 83 Ky. 21 (*September Term, 1884*), brakeman injured in collision, judgment for defendant in the Ohio Circuit Court was *affirmed*. The facts of the case are stated in the opinion by HINES, CH. J., as follows:

This is an action to recover damages for an injury received by appellant through the alleged wilful and gross negligence of appellee while appellant was in its employ as brakeman. Appellee denied any kind of negligence, and pleaded contributory negligence on the part of appellant. On application of appellee, the jury were required to answer certain questions, in the nature of a special verdict, and at the same time appellant also propounded numerous questions which were answered by the jury; but the court, on the application of appellant, refused to instruct the jury to find a general verdict, and neglected to define to the jury the meaning of wilful or gross negligence.

The facts testified to by appellant are, that he was braking on a freight train of appellee near McHenry mines, when the train was divided into two sections, and appellant directed by the conductor, who remained with the rear section, to go with the front section, to which the engine was attached, down to the switch at McHenry mines, and throw the switch so the rear section might follow and be run onto the side-track, and that, when he had so thrown the switch, to cause two whistles to be sounded, and that the conductor would then bring down the rear section and run it onto the switch. Appellant testifies that, as directed by the conductor, the engineer, the fireman and himself went down the main track past the switch, stopped the engine, opened the switch, and had two whistles sounded for the conductor to bring down the rear section. That after waiting some fifteen or twenty minutes, and seeing and hearing nothing of the rear section, he walked around a curve in the road to ascertain the cause of the conductor's delay, and saw that his cars were "stuck." He then returned, without direction from the conductor or any one, closed the switch, informed the engineer that the rear section was "stuck," and requested him to back up, and assisted in moving the rear section; that, in obedience to this direction, the engineer backed his train, and in going around the curve a collision occurred between the two sections, both at the time moving from opposite directions, and appellant, being on next to the rear car of the front section, was injured. Appellant also testifies that, in so backing a train, the rules of the road required that three whistles should be sounded, and this was not done; but there is other evidence tending to show that the signal was given. There was also evidence tending to show that the car that was wrecked, and which resulted in the injury to appellant, was decayed and insecure. This is enough of the evidence to illustrate the questions of law presented.

The principal complaint of appellant is, that the court refused to direct a general verdict in addition to the special findings; that the court erred in not defining to the jury the difference between ordinary and wilful or gross neglect, and that the directions for special, separate findings were so numerous and involved as to be misleading to the jury.

To the first inquiry presented to the jury at the request of appellant they found that appellant was damaged by the collision in the sum of \$5,000. The second was as follows: "If you say he was damaged, was the injury the result of plaintiff's own negligence or the negligence of the defendant?" Answer. "Plaintiff's own negligence."

The fifth is: "If you find that the engineer was negligent in not giving the proper signal of his movements at the time of the alleged injury, then you will say so, and also whether said negligence was gross or only ordinary?" Answer. "Ordinary."

The seventh requires the jury to say whether, at the time of or before the collision, the engineer and conductor, by ordinary care, could have prevented the injury. Answer. "At the time they could not."

The eighth requires the jury to say whether, if the car wrecked was defective, "it could have been discovered by the close scrutiny and inspection of skilful and competent inspectors." The jury answer: "We think not."

On the request of appellee, the jury found that the engine was signaled to move back by appellant, and that he gave the signal of his own accord, without any direction from the conductor or any one else. The sixth inquiry for appellee was: "Would said accident in which plaintiff was injured have occurred if the plaintiff had not given such signals to said engineer?" Answer. "No."

The fourteenth inquiry is: "Did the employees of the defendant, other than plaintiff, upon said two parts of said train while said sections were approaching each other, and as soon as they knew there was danger of a collision thereof, or as soon as they reasonably might have known it, make the proper effort to stop said car and prevent such collision?" Answer. "Yes."

A consideration of the questions raised by counsel involves the necessity of construing sections 317, 326, 327, 328 and 329 of the Civil Code." * * *

The court discussed the aforesaid sections of the Code, the substance of the rulings being stated in the syllabus to the official report as follows:

"1. A separate general verdict was intended to apply in cases where there is more than one issue, and is a finding for the plaintiff or defendant upon a particular issue.

"2. A special verdict is a finding of facts, without reference to their relation to any issue.

"3. If a general verdict is asked, the court *must* grant it, and require the jury to return also a general verdict.

"4. If a special verdict is asked, the court *must* grant it, and *may* in its discretion, also direct a general verdict, but is not compelled to do so as in the case of a separate general verdict; if, however, the court does direct a verdict, it must instruct the jury as to the whole law of the case. (But see Acts 1886, vol. I, p. 120.)

"5. In directing a special verdict the court should confine the questions propounded to the controlling facts in the case, and they should be such as to enable the court, on the return of the verdict, to apply the law and enter judgment without anything further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury to assess the amount of recovery.

"6. In this action, for wilful and gross neglect, in which the court directed only a special verdict, the failure of the court to instruct the jury as to what is ordinary and what is wilful or gross neglect, was not an error, because when all the facts are found by the jury this is a question of law properly reserved by the court under section 317 of the Code." (JOHN W. MCPHERSON, JOE MCCARROLL, and EDWARD W. HINES, appeared for appellant; HOLMES CUMMINS, for appellee.)

NEWPORT NEWS AND MISSISSIPPI VALLEY CO. v. DENTZEL'S ADM'R.

Court of Appeals, Kentucky, September Term, 1890.

[Reported in 91 Ky. 42.]

BRAKEMAN INJURED IN COLLISION BETWEEN TWO SECTIONS OF A FREIGHT TRAIN — WILFUL NEGLECT OF CONDUCTOR AND ANOTHER BRAKEMAN — RAILROAD LIABLE.—Where a heavily loaded freight train in descending a grade broke into two sections, and the engineer becoming apprised of it, put on additional steam and ran ahead with the front section (on which was plaintiff's intestate, a brakeman) to avoid a collision, and repeatedly gave the whistle alarm for a stop of the rear section, and supposing that the latter was stopped he checked the front section, and almost immediately the rear section ran into it and plaintiff's intestate was injured; and it appeared that the rear brakeman, instead of being at his post, was in the caboose with the conductor, and neither paid any attention to the engineer's whistle: *Held*, that the neglect of the rear brakeman and conductor was wilful.

RESPONDEAT SUPERIOR — FELLOW-SERVANTS.— While a railroad company is not liable to an employee for injury arising from the neglect of a co-laborer, not superior to the one injured, yet, in this case, as the conductor was the superior to the injured brakeman and a party to the neglect, the rule of *respondeat superior* applies, and the railroad company is liable.

SURVIVOR OF ACTION.— Where there is an appreciable interval of suffering between the time of the injury to a person and his death, a right of action accrues to the person injured, and this right survives to his personal representative, under chapter 10 of the general statutes, although the deceased may have left neither wife nor child (1).

DAMAGES.— The jury not only had the right to compensate for the sufferings of the injured person from the time of the injury until death (in this case a period of nine hours), but also to award such exemplary damages as they saw fit, and the court cannot undertake to say that the verdict (\$7,500) was so excessive as to authorize a reversal.

APPEAL from Grayson Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

HOLMES CUMMINS, G. W. STONE, P. H. DARBY, for appellant.

MATT. O'DOHERTY, for appellee.

Holt, Ch. J.— John Dentzel, while in the employ of the appellant, the Newport News & Mississippi Valley Company, as a brakeman, and when engaged in his duties as such employee, received injuries which caused his death nine hours after their infliction. A heavily loaded freight train of the appellant, of

1. In *LOUISVILLE & NASHVILLE R. R. Co. v. CONIFF'S ADM'R*, 90 Ky. 560 (September Term, 1890), action under the statute to recover for negligent killing of an employee, and also for pain and suffering of the plaintiff's intestate during the time intervening between the injury and the death, it was held that the cause of action did not survive to the personal representative unless the injury was the result of gross or wilful negligence. (Section 1, chapter 57, General Statutes.) Judgment for plaintiff was *reversed*. The second paragraph of the syllabus to the official report states the case as follows: "The fact that the conductor and engineer of a train moving slowly in a switch-yard were both off the train did not constitute negligence

as to a yard employee, who, by reason of the spreading of the rails, was struck and killed by a lever used by switchmen to shift the cars from one track to another. The fireman and brakeman who were left in charge of the train being competent to manage it, and there being no negligence on their part, the company is not liable."

In *PERKINS v. STEIN & COMPANY*, 94 Ky. 433 (January Term, 1893) action for damages against defendant for negligent running over a person by one of defendant's brewery wagons, it was *held* that "an action against a master to recover damages resulting from the negligent driving of his servant survives to the personal representative of the person injured," and judgment for defendant was *reversed*.

about seventeen cars, stopped when upon an ascending grade. In endeavoring to move it, a draw-head was torn from its place, but the train soon started again, and, upon doing so, the deceased resumed his proper place as a brakeman upon the front part of the train, while the only other brakeman upon the train, and whose place was upon the rear part of it, went into the caboose, which was the rear car, with the conductor. The train, in some way not disclosed, was soon thereafter broken in two sections, and the engineer, becoming apprised of it, put on additional steam and ran ahead with the front section, the deceased being thereon, to avoid a collision. As soon as he discovered that the train was broken, he whistled for the rear section to put on the brakes, and the evidence shows if it had been done a stop would have been had within a very short distance, say the length of the train. The front section ran on for about two miles and a half, passing one station in the meantime, the engineer repeatedly giving the whistle alarm for a stop of the rear section, so often, indeed, that it alarmed the people living along the road. Supposing that those upon it had stopped it, he then checked the front section, and almost as soon as he did so the rear section ran into it, and in the wreck the deceased was injured. The testimony shows that the rear brakeman, instead of being at his post, was in the caboose from the time when he went into it, as already stated, until the collision occurred.

While the appellant is not liable to an employee for injury arising from the neglect of a co-laborer, not superior to the one injured, yet, in this instance, the conductor, who was in charge of the train, was a party to the neglect. He not only permitted it upon the part of the rear brakeman, but also failed to give attention otherwise to the conduct of the train. The rule of *respondeat superior*, therefore, applies, and it is evident the neglect was wilful. It was an intentional failure upon the part of the one in charge of the train, and who represented the company, to perform a known and manifest duty, important to the safety of the deceased.

The averments of the petition show that this action by the administrator of the deceased was not brought under section 3 of chapter 57 of the General Statutes, which authorizes suit for the recovery of punitive damages for *the loss of life* against the person or company or corporation through whose wilful neglect it occurs. Such an action cannot be maintained in a

case like this one, as this court has repeatedly held in *Henderson v. Ky. Cent. R. Co.*, 86 Ky. 389; *Jordan's Adm'r v. Cincinnati, etc., R. Co.*, 89 Ky. 40 (1), and other cases, because the deceased left neither wife nor child. But it was brought, alleging that the injury occurred through the wilful neglect of those controlling the train for the company, and to recover such damages as would have compensated the deceased for the loss of time and his physical and mental suffering from the time of the happening of the injury up to his death, as well as such exemplary damages as the jury might see proper to

1. *HENDERSON'S ADM'R v. KENTUCKY CENTRAL R. R. Co.*, 86 Ky. 389 (September Term, 1887), was an action brought under section 3, chapter 57, General Statutes, by the personal representative to recover damages for the death of Charles L. Henderson, caused by the alleged wilful neglect of the defendant or its agents. The section referred to is as follows:

"If the life of any person or persons is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

See, also *McLEOD v. GINTHER*, 80 Ky. 399, 4 Ky. Law Rep. 276, where it was held that the General Statutes, chapter 57, section 3, gives a cause of action to the widow of decedent for the wilful neglect of the company or its agents or employees which resulted in his death, though he was an employee of the company.

In *JORDAN'S ADM'R v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. Co.*, 89 Ky. 40 (January Term, 1889), engineer killed, the question turned on the rights of parties under the

Death Statute, section 3, chapter 57, General Statutes. The question was discussed at length by Mr. Chief Justice Lewis, who gave a synopsis of the several statutes, from Lord Campbell's Act (England, 1846) to the Kentucky General Statutes, chapter 57, section 3. The ruling in the case of *Henderson's Adm'r v. Kentucky Central R. Co.*, 86 Ky. 389, was followed (see preceding paragraph), the court saying that the same question was presented as in that case, where it was held that the word "heir" as used in section 3, chapter 57, General Statutes, was intended to mean child; that the widow and children of a person whose life is destroyed by wilful neglect, have the prior right to sue for and exclusive right to what may be recovered in an action thereby authorized, and, consequently, the alternative right of action given to the personal representative can be exercised only for their use and benefit. The *Jordan* action was brought by the administrator of the deceased; the answer pleaded in bar that deceased left no widow or child; the reply was that deceased left, as "heirs," a father, mother, sister and brother. It was held that a demurrer to the answer was properly overruled, a demurrer to the reply was properly sustained, and petition was rightly dismissed.

award under all the circumstances of the case, not exceeding the amount claimed in the petition. The demurrer to the third paragraph of the answer, which set up as a defense to any recovery that the deceased left neither wife nor child, was, therefore, properly sustained.

By the common law no right of action accrued to any one for personal injuries resulting in instant death; but if there was an appreciable interval of suffering, a right of action for it did accrue to the person injured; and this right of action survives to his personal representative by chapter 10 of the General Statutes, which provides: "No right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action on contract."

The statute authorizing an action for loss of life through wilful negligence was intended not to restrict but to enlarge the common law; to give a right of action where none existed before, and not to cut off one which already existed. (*Hansford's Adm'r v. Payne & Co.*, 11 Bush, 380.)

It has been suggested, in the consideration of the case, that if the personal representative of an injured employee, who does not die immediately, and who leaves neither wife nor child, can sue for the loss of time and the suffering of the deceased between the time of the infliction of the injury and his death, then this will, in effect, defeat the construction which has been given to the statute; and that although, by reason of having no wife or child, no action can be maintained for the loss of life, yet the jury will be apt to consider it in estimating the damages, and render a verdict accordingly. This is, however, supposing that the jury will not regard their oaths, and will disregard the instruction of the court. The life of a person may, under the tables of mortality, be estimated in value. When the jury are informed of his age and his ability to labor, they can fix its value; and certainly they will not return damages for its loss when told, as they were in this case, that they cannot do so.

As the law now stands in this State, the personal representative of any person who was not in the employment of a railroad company may sue for the loss of his life through the neglect of the company, whatever be the degree of the neglect, and just as the person himself might have done for the injury if death had not ensued. This is by virtue of the first section of chapter 57 of the General Statutes, and by the third section a recovery may be had for the loss of life of any person, whether a railroad employee or not, if he left a wife or child, and it was caused by the *wilful* neglect of a person, company or corporation; and the recovery may include punitive damages. But this statute gives a remedy for *the loss of life*, and it does not abrogate the right, which existed at common law, of one who is injured, whether the injury be inflicted by a railroad company in whose employ he may be or not, and who does not die immediately, of either suing before his death for the loss of time and his suffering, or of his personal representative to do so after his death.

In this case, after the testimony for the appellee was closed, the appellant declined to offer any, and by its counsel announced in open court that it conceded its liability upon the facts shown, and the only question was the measure of recovery. This was, in effect, a withdrawal of its answer; it was a confession of liability.

It is now urged as grounds for a reversal, first, that the court improperly submitted to the jury the question, whether the appellant had been guilty of wilful neglect; and, second, that the verdict is excessive. It is said that the answer admitted the facts, and, therefore, the court should have determined whether they showed wilful neglect, and that this question should not have been left to the jury. The question of negligence is a mixed one of law and fact. If disputed, it is the province of the jury to find the degree; if undisputed, the court determines it. (*L. & N. R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*.) If it be questionable in a case where this duty rests, it should be left to the jury. In this case, however, the appellant was not prejudiced by leaving the character of the negligence to the jury, because, if the court had determined it, it would have been bound, upon the facts of the case, to have found it to have been wilful.

We do not feel at liberty to disturb the verdict upon the score that it is excessive. The deceased, it is true, was uncon-

scious from the time of the accident until his death. But no person can tell the extent of his physical and mental suffering; it was voiceless, save in the way of moan. It was the province of the jury to fix the damages. They had a right not only to find damages by way of compensation for the suffering from the time of the infliction of the injury until death, but to also award such exemplary damages as, under the circumstances, they saw fit. Having the right to award both, we cannot undertake to say that the verdict is so excessive as to authorize a reversal.

The judgment is, therefore, affirmed.

BRAKEMAN WHILE RIDING ON LADDER OF CAR CRUSHED BETWEEN CARS—REMITTITUR—NEW TRIAL—DAMAGES.—In **LOUISVILLE & NASHVILLE R. R. CO. v. EARLS' ADM'X**, 94 Ky. 368 (*January Term, 1893*), judgment was directed to be entered for plaintiff, on verdict rendered for \$4,000 in the Hart Circuit Court. The facts of the case are stated by HAZELRIGG, J., as follows:

"The first paragraph of the appellee's petition sought damages of the appellant company, by reason of its gross and wilful neglect in crushing her intestate husband between two of its cars, and causing him great pain, anguish, loss of time, etc. The second sought damages for the loss of his life, caused by the wilful neglect of the appellant. Being required to elect, she proceeded on the cause of action set up in the first paragraph, and obtained a verdict for four thousand dollars. The court regarded this as excessive, and required her to take judgment for two thousand five hundred dollars, as announced, or a new trial would be granted. Accordingly, judgment for the latter sum was entered. Both parties complain, and it is evident that if the company were entitled to a new trial, it should have been granted without the imposition of any terms. If not, the appellee should have had her judgment in pursuance of the jury finding. In any event, the judgment for two thousand five hundred dollars is erroneous, and must be reversed. (See *Brown v. Morris*, 3 Bush, 82.) The question then is, shall the appellee have judgment in conformity with the verdict of the jury, or shall the appellant have a new trial?

"The solution of the question depends on whether or not there were errors committed on the trial of the cause to the prejudice of the company. If yea, then a new trial must be ordered; if nay, judgment for four thousand dollars must be entered.

"From the testimony it appears that Earl was a brakeman in the service of the company. When the train reached Mundordville,

moving north, the engineer turned over the engine to the fireman. The conductor was also off the train. It was a freight train, and some switching had to be done. Earl got off the cars at Logston's store, some eighty yards from the switch; the engine moved north with some box cars attached, towards and over the switch. There a box car was "kicked in" on the siding. Some four or five minutes are saved by this process of "kicking in," and the conductor proves that they were in a hurry. After this the engine backed to where Earl stood, who coupled it to the "dead" cars, when, on Earl's signal, it again started north "pretty fast." Earl, as was the usual custom, caught up with the rear car and was riding on the ladder on the side, intending to get off at the switch where other switching was to be done. But the "kicked in" car had not been rolled back far enough on the side track to allow a man's body to pass between it and the moving cars. This close proximity was noticed by the fireman — the acting engineer — on backing down a few moments before; and he testifies that he slowed up to see if his cab would pass. Earl knew nothing of this, and when he noticed it as he rode rapidly toward it, he could neither let go nor reach the top of the car. He tried the latter means of escaping the danger, but was caught and badly crushed. He lived ten days in torture and died. The plaintiff's evidence was to the effect that Earl took no part whatever, by signals or otherwise, in placing or locating the "kicked in" car, and while he might have seen its dangerous position if his attention had been attracted in that direction, he was engaged in the work of coupling the live to the dead cars, and then in watching the ladder he was reaching for, and could not have observed the danger.

"It is insisted, in the first place, that the defendant was entitled to a peremptory instruction because of the negligence of the deceased, but we fail to perceive wherein he was negligent. The custom of brakemen riding on the ladder from one point of work to another was clearly established. This was the well-known way of doing such work as was before Earl on this occasion. It was inexcusable negligence to leave the "kicked in" car so close to the main track that the engineer's cab could barely pass it. This negligence caused the injury, and Earl is shown in no way to have contributed in thus locating this car. The fireman slowed up to insure the safe passage of himself, but unfortunately failed to observe similar care for the safety of others." * * *

"Thirdly, the instructions are complained of because No. 1 authorizes a recovery from the evidence, and not from the preponderance; but in No. 8 the jury were told that, "before plaintiff can recover in the case, it is her duty to establish by the preponderance of the evidence that the employees of defendant were guilty of wilful or gross neglect. Ordinary neglect would not authorize a recovery."

"It is said that No. 2 'assumes loss of time, pain and suffering, and then authorizes the jury to give punitive damages if the negligence was willful.'" It is well settled that an uncontradicted fact may properly be assumed in an instruction, and the deceased confessedly did suffer as indicated. To the extent that the right of recovering punitive damages was based on the establishment of wilful neglect, the instruction was too favorable to the defendant. It required the greatest degree of negligence when only gross negligence was sufficient to warrant the finding of such damages. See *Louis. & Nash. R. Co. v. Mitchell*, 87 Ky. 332, 15 Am. Neg. Cas. 163, *ante*; *Louis. & Nash. R. Co. v. McCoy*, 81 Ky. 411, 11 Am. Neg. Cas. 626, also 15 Am. Neg. Cas. 168, *ante*.)

"Instruction No. 9 required the jury to find for the defendant, if they believed that Earl, in the performance of his duty as brakeman, failed to properly set the car on the side track, and left it so as to injure him in the further discharge of his duty, "unless they further believe that the fireman in charge of the engine could, by reasonable diligence, have discovered his danger, and by the use of reasonable diligence averted the injury." It is urged that the fireman owed no duty to Earl if guilty of contributory negligence, unless he *became aware* of the danger to him, and by the exercise of care, could have averted the injury. But in *L. & N. R. Co. v. McCoy*, *supra*, it is said: "We do not understand the law to be that the party charged with gross neglect is relieved from responsibility in every case by the contributory negligence of the injured party unless he *had actual notice* of the injured party's fault in time to protect him. If the appellee, by his own negligence, contributed to such an extent to produce the injury to himself, that but for his negligence it would not have happened, then he has no cause of action, unless the appellant's agents in managing and coupling the train knew, or could have known, by ordinary attention, of the peril in which appellee's negligence had placed him, and failed to observe reasonable care to avoid the injury which followed."

"This is substantially the instruction complained of. In No. 7 the jury had been told that if they "shall believe from the evidence that Earl negligently and carelessly undertook to ride on the side of the car at the time he was injured, and by the use of ordinary care and diligence he could have discovered his danger in time to arrest the injury, then the law is for the defendant, and the jury should so find."

"Taking the instructions together; the modification of No. 9 referred to the danger to Earl in his placing the car on the side track. That was the subject-matter of the instruction, and the concluding clause referred to that danger, and not to the peril Earl may have placed himself in by riding on the ladder, but if otherwise the instruc-

tion was right. In switching and handling cars the fireman must be diligent and wide awake to dangers in the rear as well as in front. Indeed, the only danger to life was in the rear where the men were engaged in their hazardous work. If Brasher is to be believed, the slightest attention on the fireman's part to the frantic appeals and signals of himself and Earl to stop the train would have given Earl time to have reached the top of the car. A moment more and he would have escaped. The fireman says he saw nothing of these signals, but the other swears that he made them in plain view of him, and when his eyes were turned toward him." * * *

"On the appeal of the company the judgment is affirmed, but reversed on the cross-appeal, and remanded with directions to enter judgment for four thousand dollars in conformity with the verdict of the jury." (LEWIS McQUOWN appeared for appellant; J. C. POSTON, J. J. STAMP and J. P. HOBSON, for appellee.)

BRAKEMAN FOUND IN DYING CONDITION ON TOP OF BOX-CAR — CONTACT WITH OBJECT — EVIDENCE — PRESUMPTION — NEGLIGENCE MUST BE PROVED — RAILROAD NOT LIABLE. — In **HUGHES v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO.**, 91 Ky. 526 (*January Term, 1891*), judgment on peremptory instruction in the Pulaski Circuit Court to find for defendant was *affirmed*. The facts of the case are stated in the opinion by HOLT, CH. J., as follows:

"Mary A. Hughes, widow of William Hughes, sues for damages upon the ground that his death resulted from the wilful neglect of the appellee. At the close of her testimony the lower court peremptorily directed the jury to find for the company. If a *prima facie* case had been made out; if, indeed, there was evidence tending in any degree to show a right of recovery, this was error. This rule is too well settled in this State to need the citation of authority. The only question, therefore, before us is whether, guided by this rule, the instruction was proper.

"The deceased was a brakeman upon appellee's road. He had been so acting for nearly a year. During that time he had passed over the portion of the road where he was killed once, and sometimes twice, a day. He was entirely familiar with all the dangers usually incident to the service upon it. The train, a freight, consisting of quite a number of cars, and manned by a crew of three or four brakemen, an engineer and a conductor, was going north. It stopped upon the summit of a hill to get coal. The descent from there was several miles long, and a steep grade. In descending, the train had to pass through four tunnels, known as Nos. 9, 8, 7 and 6. They were reached by the train in the order named. When it stopped to coal the deceased was at the engine, and before it started he passed

back over the train to the caboose, and when last seen alive he was at the rear of the train setting a brake. This was just before the train reached the first or No. 9 tunnel. The next seen of him was after they had passed through all four of the tunnels. He was then found in the agony of death upon the top and right at the north end of the fifth car from the caboose. It was a box-car not belonging to the appellee's road, and higher than the ordinary car of that character. He was lying upon his back, his feet at or over the edge of the car, and the back of his head crushed in by coming in contact with some object. Tunnel 9 is about a half mile from No. 8, is about a sixth of a mile from No. 7, and is about a half mile from No. 6. While the train was running from where he was last seen until he was struck he passed over five cars, but exactly when he did so is not shown. There was no eye-witness to the injury. The petition avers that the accident occurred in tunnel No. 7, and was occasioned by the wilful neglect of the company in suffering timbers therein to be out of place. *Contra*, it is claimed by the appellee that it occurred in tunnel No. 6. It is shown that one cannot pass through the latter standing upright upon an ordinary box car, nor through No. 7 upon such a car as that upon which the deceased was found, and that it was usual in passing through these tunnels for the brakemen upon box-cars to sit or lie down by the brakes, as they were compelled to be upon the tops of the cars to regulate the speed of the train, it being a down grade.

"The *only* testimony as to any loose timbers in tunnel No. 7 is, that one of the hands upon the train says, as they passed through it, he saw the tunnel gang were at work there; he noticed some old timbers on one side of the track, and a new timber that was being put in its place was hanging up by the ropes. The evidence does not fix the position of this timber. It is not shown whether it was upon the side or next to the roof of the tunnel. There is no testimony whatever tending to show that it was in a position to strike a brakeman upon the top of a train when in his usual position in passing through the tunnel, and had it been so, it seems to us it could easily have been shown.

"The appellant urges that because one or two fingers could have been placed in the wound, and it was across the back of the head; because the deceased was not knocked from the top of the car, but was lying upon it upon his back, therefore, he must have been struck by the loose timber. We fail, however, to see why these conditions might not just as well exist in case the deceased, by standing up, came in contact with any part of either one of the tunnels, whether a part of the wood-work or stone formation. The fact also that the speed of the train increased between tunnels Nos. 7 and 6 adds nothing to appellant's claim as to the manner of the injury, because the momen-

tum of the train would naturally become greater as it approached the foot of the hill. It is said it was occasioned by the deceased being no longer able to regulate his brake; but other causes might equally have produced the increased speed.

"There is, in our opinion, first, no evidence tending to show that the injury was received in tunnel No. 7; and, second, if it was, then there is no evidence that it was caused by the hanging timber. If the deceased, knowing he could not pass through these tunnels standing upon the top of the car, neglected to take the usual precaution of sitting down, there can be no recovery. There is no evidence showing whether he was thus injured or whether it was caused by the alleged timber. We are left to theorize as to it. One suing to recover damages for injury arising from another's neglect must offer some testimony conducing to show that it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way. It cannot be found without evidence. The complaining party must not only show the injury, but also some evidence tending to show that the other party is to blame for it. Mere proof of the injury, with attending circumstances showing that the party charged with neglect may be blameless, or may be at fault, will not do. In such a case there is no evidence tending to show that the injury was due to neglect. Circumstances are merely presented upon which one may theorize as to the cause of the accident. The burden of showing neglect rests upon the complainant, and under such circumstances he has offered no evidence tending to show it. He has merely presented two or more states of case upon which one may theorize as to the cause of the accident. Here, first, the deceased may have been struck by the low roof of tunnel No. 7; or, second, by that of No. 6; or, third, by the hanging timber in No. 7; and only in the latter case could there be any liability upon the part of the company. One thing is certain, the wound being upon the back of the head, shows that the deceased had his head turned from the direction the train was going when he was injured." * * *

RAILROAD PORTER INJURED WHILE COUPLING CARS — WILFUL NEGLIGENCE — FELLOW-SERVANTS — GROSS NEGLIGENCE — ERRONEOUS INSTRUCTIONS. — In **CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY CO. v. PALMER**, 98 Ky. 382 (*September Term, 1895*), where a porter in defendant's employ had his thumb injured while engaged in coupling cars, judgment for plaintiff in the Boyle Circuit Court was *reversed*, for erroneous instructions on gross negligence, etc. The opinion was rendered by PAYNTER, J., and the facts of the case are thus stated:

"The plaintiff was porter on the train, which made a daily trip

from Junction City, Kentucky, to Cincinnati, Ohio, and return. On returning to Junction City in the evening the train was made up for the trip on the following day. It was "made up" by taking the cars constituting the train from the main track, one at a time, and putting them on the siding or switch. The yard engine was used for the purpose, and it was the duty of the night yard-master, located at Junction City, and of the brakeman and the train porter of this train, to do the work essential to make up the train. The plaintiff was employed on a Saturday evening, made that day's trip, and on returning to Junction City helped make up the train. He did the coupling. On Monday following he made that day's trip, again performing the service of coupling in making up the train. There were five cars in the train, and in making the coupling to the last car the injury was received. The conductor's duties ended on arriving at Junction City. It appears that the night yard-master was not performing his duties, and the porter of the parlor car was assigned to his place during the "making up" of the train. The night yard-master usually did the coupling in making up the train, the porter throwing the switch. A former porter on this train frequently did the coupling. In making up the train one of the employees unlocked the switch, one stood on the end of the car to operate the brakes and another of the crew did the coupling. On the occasion of the injury and the preceding Saturday the brakeman unlocked the switch, the parlor-car porter operated the brakes and plaintiff did the coupling.

"The plaintiff testified that the conductor ordered him, before arriving at Junction City, to help make up the train. This the conductor denies, claiming it was the porter's duty under his employment, to aid in that work. Plaintiff does not testify that the conductor told him to do the coupling. The brakeman and the parlor-car porter testified that the plaintiff was asked on each night which part of the service he would rather perform in "making up" the train, and that he chose to do the coupling. Plaintiff, while on the witness stand, does not deny this. The conductor offered Palmer the position of porter on the train and he said he would accept it.

"The question arose as to whether he knew the duties of the position, and in his testimony Palmer said that "I told him I knew the duties of the porter on that train, and his duties were to help the passengers on the cars, help take the baggage off, help cut the pipes between the cars and unlock the switch and the making up of the train."

"Such witnesses as testified for the defendant said it was plaintiff's duty to help make up the train. Besides, the plaintiff admits that when he accepted the position he knew it was his duty to help make up the train. It must stand from this record as an admitted fact that it was plaintiff's duty, under his employment, to help make up the train." * * *

Continuing, the court discussed the points, and ruled upon the same as follows:

"The court gave the jury six instructions. They were in substance or literally, as they are made to appear, as follows:

"1. That if plaintiff received the injury by the *wilful* or gross negligence of the defendant's engineer in running back to make a coupling, plaintiff was entitled to recover damages and the jury, in their discretion, could 'find additionally such damages as will be punishment to defendant for a wrongful act intentionally done.'

"2. Was a definition of wilful negligence.

"3. Gross negligence, as applicable to this case, is equivalent to slight care only, or the absence of that degree of care which most men of prudent and careful habits or temperament would have exercised under the same or like circumstances to avoid injuring others.

"4. The jury was told to find for the defendant if plaintiff's negligence contributed to the infliction of the injury in such a degree as that it would not have occurred without it.

"5. There is yet another state of case upon which, if you believe from the evidence it exists, you may find for the plaintiff simply compensatory damages, without holding him to *proof of either wilful or gross negligence*, and that is this: If you believe from the evidence that making up of this train was not one of the duties of plaintiff under the terms of his original employment, and also that he was ordered by the conductor of the train to assist in making up the train, and in addition that the engineer was guilty of negligence in the way or manner of his backing the engine to make the coupling, and that this negligence caused the injury, then you will find for plaintiff such damages as you believe from the evidence will fairly compensate him. * * * If you believe from the evidence that assisting in making up the train was one of the duties of plaintiff by the terms of his original employment, or, although not one of his duties, if you believe from the evidence that the choice was offered him to do this or another duty, and that he voluntarily chose to do this; or if you believe from the evidence that in his effort to make the coupling he was guilty of contributory negligence defined in instruction No. 4, then you cannot find anything for him on the ground of the negligence of defendant, defined in this instruction."

"The first instruction submitted to the jury the question as to whether the injury was inflicted by gross or wilful negligence. This instruction required the plaintiff to show a greater degree of negligence than is required by the law in this class of cases. This court in many cases has held that 'wilful' negligence only applies to cases where death results. When death does not result, the common-law rule governs. (*Maysville & Lexington R. Co. v. Herrick*, 13 Bush, 127; *Louis. & Nash. R. Co. v. Long*, 94 Ky. 410,

11 Am. Neg. Cas. 579; *Craddock v. Louis. & Nash. R. Co.*, 13 Ky. Law Rep. 18.)

"The first instruction being erroneous and prejudicial to the appellee, it follows that the instruction defining wilful negligence should not have been given. These were errors prejudicial to the rights of appellee, and would not entitle appellant to a reversal.

"The fifth instruction told the jury that they were authorized to find compensatory damages, without proof of either wilful or gross negligence, if the engineer was guilty of negligence in the way or manner of backing the engine, and that such negligence caused the injury. Under this instruction the jury could find compensatory damages without believing the appellant was guilty of gross negligence. The engineer and the porter were not fellow-servants, no more than are the engineer and the brakeman. This court has held that an engineer and brakeman are not fellow-servants. *Louis. & Nash. R. Co. v. Moore*, 83 Ky. 675, 15 Am. Neg. Cas. 161, *ante*; *Louis. & Nash. R. Co. v. Brooks*, Adm'x, 83 Ky. 129 (1).

"Where servants are of the same rank and engaged in the same field of labor, the master is not even responsible for the gross negligence of a fellow-servant. *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188 (2).

1. *Brakeman killed — Wilful negligence — Punitive damages — Respondent superior.*—In *LOUISVILLE & NASHVILLE R. R. Co. v. Brook's Adm'x*, 83 Ky. 129 (January Term, 1885), judgment for plaintiff in the Marion Circuit Court for \$10,000 was affirmed, the opinion being rendered by Lewis, J. The syllabus to the official report states the case as follows:

"1. In an action under section 3 of chapter 57, General Statutes, for wilful neglect, punitive damages may or may not be given, in the discretion of the jury. It was, therefore, error in this case to instruct the jury that they "should" give punitive damages, if they found wilful neglect.

"2. The rule that, where one of two fellow-servants is injured by the negligence of the other, the common employer is not liable therefor, does not apply in cases of wilful neglect, if the two servants were not co-equals.

"In this case it is held that the engineer and a brakeman on the same train were not co-equals, and that the railroad company is liable for the death of the latter, if caused by the wilful neglect of the former.

"3. In an action to recover damages for the loss of the life of a brakeman on a train caused by the wilful neglect of the railroad company, a verdict for \$10,000 is not so excessive as to indicate that the jury was influenced by passion or prejudice."

2. *Track laborer injured — Negligence of fellow-servant.*—In *Volz v. Chesapeake, Ohio & S. W. R. Co.*, 95 Ky. 188 (September Term, 1893), judgment for defendant was affirmed where plaintiff, a member of a crew of workmen engaged in driving piles on defendant's road, had his arm crushed and cut off while "ringing" a split pile by the premature fall of a

"The master is responsible for the gross negligence of a superior, which results in the injury of a subordinate employee.

"In the very able and noted opinion delivered by Judge Robertson in the case of the *Louis. & Nash. R. Co. v. Collins*, 2 Duvall, 118, 15 Am. Neg. Cas. 138, *ante*, there appears language as follows: 'Subordinates cannot hazard gross negligence, which borders on fraud and crime. * * * While the company may not be responsible to them for his ordinary negligence, both justice and policy require that it should be held liable for his gross negligence as the chief and controlling agent in the management of its running trains.'

"Since the opinion was delivered in *Louis. & Nash. R. Co. v. Collins*, *supra*, it has been the rule in this State that subordinates associated with a superior in conducting the same work or engaged in the same field of labor can only recover damages of the master for the gross negligence of the superior. (*Louis. & Nash. R. Co. v. Rains*, 15 Ky. Law Rep. 423.)

"The engineer and the porter were engaged in the same department of the service. They were engaged in making up the train, which was connected with the running operations of the railroad.

"For the reasons given we think the court erred in giving instruction No. 5.

"By instruction No. 3 the court attempted to define gross negligence. While in the opening part of this instruction the court gave the jury a part of the definition of gross negligence, yet the instruction concludes with practically a definition of ordinary neglect. The effect of this was to allow the jury to find for the plain-

hammer under the control of a fellow-workman. The decision is stated in the syllabus to the official report as follows: "A master is not liable for an injury to one of his servants by the negligence of another servant of the same grade or rank and engaged in the same field of labor, although the negligence was gross. The members of a crew of workmen engaged under the employment of a railroad company in driving piles on the road of the company were co-equals in the same field of labor, and, therefore, the company is not liable for an injury to one of the crew by the negligence of another." The opinion was rendered by HAZELRIGG, J., who reviewed the Kentucky rulings on the

fellow-servant question, citing *Louis. & Nash. R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*; *Louis. & Nash. R. Co. v. Robinson*, 4 Bush, 508, 15 Am. Neg. Cas. 144, *ante*; *Louis. & Nash. R. Co. v. Filbern*, 6 Bush, 574, 15 Am. Neg. Cas. 144, *ante*; *Louis., Cin. & Lex. R. Co. v. Cavens*, 9 Bush, 559, 15 Am. Neg. Cas. 154, *ante*; *Louis. & Nash. R. Co. v. Brooks*, 83 Ky. 129, 15 Am. Neg. Cas. 189, *ante*; *Louis. & Nash. R. Co. v. Moore*, 83 Ky. 675, 15 Am. Neg. Cas. 161, *ante*; *Casey v. Louis. & Nash. R. Co.*, 84 Ky. 79, 15 Am. Neg. Cas. 201, *post*; *Fort Hill Stone Co. v. Orm's Adm'r*, 84 Ky. 183, 15 Am. Neg. Cas. 220, *post*.

tiff on proof of ordinary neglect; also to allow the jury to award punitive damages. This was error, as it is only in cases of gross neglect can there be a recovery, much less permitting the jury to award punitive damages.

"It is insisted for appellant that the court should have given an instruction to the effect that if the plaintiff received his injuries by want of experience or skill he could not recover. There was no proof in this record upon which to base such an instruction. It is insisted that the court should have told the jury that the plaintiff undertook all the risks and hazards ordinarily incident to or involved in the performance of all the duties which his employment embraced.

"It is true that one thus entering the service of another assumes to run all the ordinary risks pertaining to the service. While this is true he does not hazard gross negligence. To give an instruction to the effect that the plaintiff entering the service of the defendant assumed the ordinary risks pertaining to such service would be simply stating an abstract principle and would be misleading. When the jury is told in effect the plaintiff is only entitled to recover for gross neglect, it, of course, precludes the idea that they are authorized to find for ordinary neglect." Judgment reversed. (C. B. SIMRALL appeared for appellant; ROBERT HARDING and R. J. BRECKINRIDGE for appellee.)

EMPLOYEE INJURED COUPLING CARS IN SWITCH YARD—DEFECTIVE GUARD-RAIL—GROSS NEGLIGENCE—EVIDENCE—DAMAGES—LIFE TABLES—FELLOW-SERVANTS—RESPONDEAT SUPERIOR—ASSUMPTION OF RISK—INSTRUCTION.—In **GREER v. LOUISVILLE & NASHVILLE R. R. CO.**, and **LOUISVILLE & NASHVILLE R. R. CO. v. GREER**, 94 Ky. 169 (*January Term, 1893*), an appeal by each of the parties from the Marion Circuit Court, in which court plaintiff recovered a verdict for \$2,500, from which defendant appealed to the Superior Court, which, on plaintiff's motion, was transferred to the Court of Appeals, and both appeals were heard together, judgment was *reversed* for errors prejudicial to both parties. The facts of the case are stated in the opinion by HAZELRIGG, J., as follows:

"At the Lebanon switch-yard, on the line of defendant's road, it became necessary to place two gondola cars on one of the side-tracks and some box cars on another. There was some haste required, as the conductor's purpose was to keep from being held there by the next train going south. So Greer was directed by the conductor, when asked if he wanted the cars placed back against the 'dead' cars, 'to just drop them in clear of the main track,' as

he was in a hurry. 'Dropping them back' meant 'to cut them loose whilst moving, so that the loose cars would roll back to their place by the dead ones.' The conductor then signaled the engineer to back in, and it appears left, going south several car lengths toward the depot, and when the accident happened was engaged in chalking some cars to indicate their destination. The plaintiff went in to uncouple or cut loose the two cars in obedience to the instructions as he understood them, not knowing but that the conductor was near at hand to protect him. He found the pin crooked so that he could not pull it out, and walked with one foot on the outside and the other on the inside of the track for some fifteen or twenty feet, when, as affording him more strength for extricating the pin, he brought both feet within the rails of the track, and after taking a step or two his foot caught on the end of the guard-rail, or, as testified to by him, 'a splinter on the guard-rail at the frog of the switch stuck in the toe of his shoe.' With his right hand he had hold of the car in his front, and pulled his foot loose, but, losing his balance, was dragged some distance, when he fell to the ground on his hands and feet, and ran in that way some distance. From the guard-rail splinter to where he finally threw his body from under the car when his foot was caught was some twenty-five yards. When he went in to uncouple the cars, he testifies, they were moving at the rate of about two miles an hour, but their speed was increased rapidly, and they were going, when plaintiff was injured, about five miles per hour. The train struck the 'dead' cars violently, knocking them back some seventy feet. A fellow-brakeman was on top of one of the box cars, and saw Greer when he first started to fall, and testifies that he got down off the car and ran out on the opposite side from him in order to signal Martin, the fireman, who had been left in charge of the engine by the regular engineer. The fireman was waiting for signals, and appears to have known nothing of the trouble until it was about over.

"In this connection it may be observed that the company introduced an order or certificate of its master mechanic, of date December 11, 1890, to the effect that Martin was declared competent, and was authorized to handle an engine as per rule 207, which made it 'the duty of an engineer to handle his engine at all times, but a fireman may do so at a station in the immediate presence of the engine-man, provided the master mechanic has declared him competent.'

"This declaration of competency was some six weeks after Martin had been left in charge of this engine, in violation, it appears, of rule 207.

"Upon this state of case the defendant company moved the court

for a peremptory instruction in their behalf, which, we think, was properly overruled. That there was some negligence we have no doubt, and that, too, on the part of employees superior to the plaintiff in point of employment and control of the train. It is true that there must have been gross negligence in this case before the plaintiff can recover, but as was said in *Louis. & Nash. R. Co. v. Mitchell*, 87 Ky. 337, 15 Am. Neg. Cas. 163, *ante*: 'Certainly the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence.' (1)

"On the trial much prominence was given to the testimony of various witnesses as to the condition of the guard-rail, the crooked pin and the injured condition of plaintiff's arm. This testimony was objected to by the defendant, and we think the objection should have been sustained. These circumstances, if regarded as a mere matter of detail, or as incidents of the transaction, might not have been objectionable, as it is hardly possible to detail the occurrence without stating all the conditions and surroundings as they existed at the time. But witnesses were introduced solely on these matters, and for the express purpose of making them the basis of a claim for damages. This was not proper under the pleadings. The unsafe or defective condition of the track, or of any portion of the train's make up, or the sprained condition of plaintiff's arm, was not the subject-matter of inquiry. These defects were not alleged as grounds of complaint or as matters of negligence. Nor are they so connected or interwoven in any way with the act of driving or operating the train — the only negligence charged in the petition — as to be the proper subject of testimony. That its introduction was prejudicial to the defendant is apparent; indeed, the argument of plaintiff's counsel in this court consists largely in denouncing the negligence of defendant, as shown by the unsafe track and the crooked pin. What must have been his appeal to the jury? And while these alleged evidences of negligence are not made the subject of an instruction, and for that reason might be regarded under some circumstances as having been withdrawn from the jury's consideration as a basis for finding damages for negligence, it is evident that such was not the effect on the trial below. But the case having to go back, it is proper to say that the amended petition tendered by the plaintiff at the appearance term of the case, setting up these additional grounds of complaint as

1. In *LOUISVILLE & NASHVILLE R. R. Co. v. BRANTLY*, 96 Ky. 297, 19 Ky. Law Rep. 691, it was held that where the death of an employee of a railroad company is caused by the ordinary negligence of another employee of the same or of a higher grade of service, the company is not liable in damages therefor.

matters of negligence, should be permitted to be filed. The cause of action is not changed. The alleged acts of negligence all may have concurred to cause the injury. It was error to the plaintiff's prejudice to refuse to allow it to be filed, but the court having rejected it, the defendant was under no legal requirement to meet it by counter proof, and may not have been prepared to try the case on issues not presented by the pleading.

"In the case of Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, decided at this term, where the subject-matter of the negligence charged was the setting fire to a depot, it was held that the construction and combustibility of the structure alleged to have been fired were necessarily and naturally proper subjects of inquiry and of instruction. In this case, the act of driving the car over the plaintiff involved only the operation and management of the train, and was in no way connected with the unsafe condition of the guard-rail or the crookedness of the coupling pin.

"It is insisted by the company that it was error to its prejudice to permit the witness, Blandford, a life insurance agent, to read as evidence to the jury the American Life Table, showing the expectancy of a man of plaintiff's age. On this there appears to be no direct authority or precedent in this State. The cases in which such testimony has been offered and approved have been those in which loss of life has occurred." [The court, however, quoted from Thompson's Carriers of Passengers, 565, and 2 Sedgwick on Damages, § 581, showing that it is not improper to introduce in evidence standard life tables to show the expectancy of life of one of the age of the injured party as a basis upon which to estimate the amount of damages he should recover. But the proof must be taken subject to the conditions surrounding the particular case, and hence the existence of disease tending to shorten life may be shown.]

Continuing, the court discussed the instructions given by the trial court, and said:

"By instruction '1,' given at the company's instance, and properly, the jury were told not to find for plaintiff, unless they believed from the evidence "that those superior in authority to plaintiff in operating the train, with gross negligence ran said train or car wheels over plaintiff's ankle and crushed it."

"But in No. 1, given by the court over the defendant's objection, they are told that if the preponderance of the evidence shows that the defendant's employees in operating their train, or failing to control its movements properly, were guilty of ordinary, gross or wilful neglect, by which plaintiff was injured, etc., the law was for the plaintiff.

"This instruction is erroneous in two respects. The employees

must have been those who were superior to plaintiff in point of authority and control, and the negligence must have been gross.

"In the leading case of *Louis. & Nash. R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*, and which has been followed invariably since in this court, Judge Robertson said: 'It' — the company — 'is therefore responsible for the negligence or unskilfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill — as to strangers, ordinary negligence is sufficient — as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross — but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient;' and it may be here added that a fireman, when acting as an engineer, is, of course, an employee, superior to the brakeman. (*Louis. & Nash. R. Co. v. Moore*, 83 Ky. 675, 15 Am. Neg. Cas. 161, *ante*.)

"At the defendant's instance, and over the plaintiff's objection, the jury, by instruction 'A,' were told that if the risk and danger of going between the cars was apparent, open and visible to plaintiff when he went in to do the uncoupling of the cars, the jury should find for the defendant. This is misleading and erroneous. The brakeman may, indeed must, take the ordinary risk of going between cars when in motion, as the practice is shown to exist by common acquiescence, if not at the express direction of the companies, and such risk is necessarily open and visible; but it by no means follows that the conductor and engineer may desert him in his hour of peril, and the company be relieved of the consequences of the gross negligence of these officials, if guilty of such negligence, although the danger and risk imposed on the inferior employee be open and visible." * * * (W. J. LISLE appeared for the railroad company; HUGH P. COOPER for Greer.)

CONDUCTOR INJURED—DEFECTIVE BRAKES—RUNNING SWITCH—DUTY OF CONDUCTOR TO INSPECT CARS—FAILURE PRECLUDES RECOVERY FOR INJURY.—In *ALEXANDER v. LOUISVILLE & NASHVILLE R. R. CO.*, 83 Ky. 589 (*January Term, 1886*), conductor on mixed train of cars injured while train was making a "running switch," it appeared that at the time of the injury he was endeavoring to detach from the train and put upon a spur switch, about three miles from that city, called Callahan's switch, four empty flat cars, which, by reason of the main track being up grade at that place, had to be done either by the use of a rope or by what is called a

running switch, that is, cutting the cars off from the locomotive while in motion, and letting them, by the impetus given, run upon the switch track, the necessary change of rails at the intersection being made after the locomotive passes, the speed of which is accelerated upon being cut loose. But the four cars being, on that occasion, without brakes, or such as could be used, appellant found it impossible to stop or check them on the down grade of the switch track, and to avoid a dangerous collision with another car standing thereon, loaded with stone, he jumped off one of the flat cars, falling against rocks near the track, and in some way getting one of his legs run over by a car wheel, whereby he was severely and permanently injured. On the trial in the Jefferson Common Pleas judgment was rendered for defendant which, on appeal, was *affirmed*. It was held that failure by a conductor to perform his duty to inspect his car would preclude recovery in case of injury, and where there were printed rules requiring such inspection, as in this case, and the conductor failed to inspect and was injured by reason of defective brakes, he was not entitled to recover.

ENGINEER INJURED IN COLLISION — RESPONDEAT SUPERIOR — DAMAGES — INSTRUCTION. — In **KENTUCKY CENTRAL R. R. CO. v. ACKLEY**, 87 Ky. 278 (*January Term, 1888*), engineer of passenger train injured in collision with freight train, judgment for plaintiff in the Pendleton Circuit Court was *affirmed*. The rule of *respondeat superior* was applied, LEWIS, J., stating the point as follows:

"The collision, which it is in the petition alleged was caused by the wilful negligence of appellant and its servants, occurred a short distance south of the end of the side-track at Cataba station, but at a curve in the road where those in charge of the respective trains could not perceive the danger in time to prevent it. It appears from the evidence that the passenger train was, at the time, going from Covington south, and was due at Cataba 9:10 P. M., and at Falmouth 9:18 P. M. There is a slight difference in the testimony of the engineer and the local agent at Falmouth in regard to the precise time the freight train left that station bound north, but we think it is satisfactorily shown it did not leave soon enough, going the allowable rate of speed, to arrive at Cataba and get upon the side-track ten minutes, the time prescribed by the rules of the company, or any length of time, before the passenger train was due there. And as the latter train was as near on time as is generally practicable, and was entitled to the track, it is evident the collision was caused by those in charge of the freight train, which was four or five hours behind time leaving Falmouth, when a collision would be probable if not inevitable. We, there-

fore, think there was evidence tending to show, if not clearly showing, the injury to appellee was caused by the wilful neglect of not only the engineer but conductor of the freight train, who had the power to direct its movements, and ordered or improperly permitted the departure from Falmouth, and the lower court did not err in overruling the motion of the defendant for a peremptory instruction to the jury, if the maxim *respondeat superior* be applicable to a case like this, and that it should be thus applied has been settled by this court in *Louisville, C. & L. R. R. Co. v. Cavens' Adm'r*, 9 Bush, 559, 15 Am. Neg. Cas. 154, *ante*." * * *

"The next and only other question made in argument for appellant arises on instruction No. 1, given at the instance of appellee, as follows:

"If the jury believe from all the evidence that the plaintiff was in the employment of the defendant as engineer of passenger train No. 6, known as the fast line on said defendant's road, and was so in charge of said train on the evening of the first day of December, 1882, and that said train collided with local freight train No. 13, belonging to said defendant on the said road, near Catamba station, on said road, and that thereby said plaintiff received injuries on his head, shoulders, hip and spine, or either, and that from said injuries he was temporarily or permanently disabled from labor at his business in whole or in part, and that said injuries were the result of the wilful negligence of defendant's employees in control of said freight train No. 13, at said time, they shall find for the plaintiff such damages as he sustained, not exceeding the amount claimed in the petition, unless they shall further believe from the evidence that said plaintiff contributed by his own negligence to bring about said collision and injuries, and but for said plaintiff's negligence he would have escaped the injuries, in which latter case they should find for the defendant." The objections made by counsel to that instruction are, that it authorized the jury to give compensatory damages, without being informed by the court of the *criteria* by which it was their duty to be governed in fixing the amount, and in directing them, in case they believed the injury was the result of wilful neglect, to find punitive damages, instead of leaving such finding to their discretion.

"Compensatory damages for personal injuries, where death does not ensue, as held by this court, is confined to the expense of cure, value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money." * * *

"Neither the expense of cure, value of time lost, nor mental and physical suffering, are referred to in the instruction as elements of damages sustained by the plaintiff, and to be assessed by the jury; but the language used by the court restricted their inquiry to the

extent of his disability to labor at his business, that is, reduction of his power to earn money." * * *

"We do not think the jury could have regarded themselves authorized by the instruction to find punitive damages. The language is: 'They shall find for the plaintiff such damages as he *sustained*,' which is entirely distinct from the idea of exemplary or punitive damages, that might have been given to or found for, but could not, in any sense, have been sustained by him." * * *

LOUISVILLE AND NASHVILLE RAILROAD CO. v. WILLIS.

Court of Appeals, Kentucky, January Term, 1885.

[Reported in 83 Ky. 57.]

PARENT AND CHILD—MASTER AND SERVANT—VOLUNTARY ACT OF SON IN PERFORMING DUTIES OF BRAKEMAN UNDER ORDERS OF CONDUCTOR—RAILROAD COMPANY LIABLE FOR INJURIES TO MINOR.—In an action by a parent to recover damages for loss of services, etc., of his minor son who, while voluntarily acting as brakeman at the request of the conductor, was injured while coupling cars, it appeared that prior to the injury the son had been employed by defendant for wages but had been discharged. *Held*, that it was not necessary that the son should have been employed for wages when the injury was received in order that the father may recover. *Held, also*, that the duty of the father to educate and maintain his son entitled the former to son's services and created the relation of master and servant between them, and the father was entitled to recover of the defendant for injury to the son while the latter was acting under the direction of defendant's conductor, even if the son was not employed by defendant for wages (1).

APPEAL from Shelby Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

W. LINDSAY and L. A. WEAKLEY, for appellant.

L. C. WILLIS, for appellee.

Holt, J.—The appellee, W. J. Willis, recovered a judgment in the lower court for \$500 for trouble and expense in caring for his son and the loss of his services, arising from an injury to him while engaged in coupling the cars of the appellant.

1. In *LASHBROOK v. PATTEN*, 1 Duvall (Ky.) 316 (Winter Term, 1864), it was held that a father is liable for injuries resulting to another from the negligence of his minor son in driving the horses and carriage of the father, and in such a case the son must be regarded as the father's servant.

The father bases his right to recover upon the fact that his son was under age, and that the appellant, without his knowledge or consent, employed and permitted the son to render service for it in the hazardous capacity of brakeman.

The answer denies the allegations of the petition, and alleges affirmatively, among other matters, that the injury resulted solely from the son's negligence.

If this statement were material, yet it is denied, because the order filing the answer recites that, by consent, its affirmative statements are traversed.

It appears that the son had, prior to the date of the injury, been in the employ of the appellant for wages, but had been discharged; and that when the injury was received he was voluntarily acting as brakeman, by the request or at the instance of the conductor in charge of the train.

It consisted of sixteen cars, and had but one brakeman, beside the son, upon it, although, according to the testimony, at least three were necessary or usual; and, although the conductor testifies that he did not know when or where the son boarded the train, yet it is quite evident that he, as appellant's general agent for all purposes to the running of it, knew, long before the accident occurred, that the son was rendering the appellant service as brakeman, and, in fact, the conductor was giving directions to him as such and as to the very work he was doing when the accident occurred.

It is not necessary that he should have been employed for wages when the injury was received in order that the father may recover. If he was then rendering service for the appellant by the request or direction of its general agent as to the business in hand, and which was certainly of a character dangerous to life and limb, then, being under age, it was a wrongful interference with the right of the appellee to control him.

The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him by the general agent of the appellant at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to do it before it took control of him.

The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the

attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another, renders the latter liable at least for any injury that was likely to result from such illegal conduct. If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskilfulness of the servant, owing to the fact that the person, by so illegally interfering, assumes all the risk incident to the service.

The instructions in the case conform to this rule. The lower court, in saying in the first instruction, that if the son was "*employed*," etc., must be understood as meaning simply that if the son was then rendering service for the appellant, and not that he must have been engaged at the time under a contract for wages; and there is, therefore, no conflict between the evidence and the instruction, and it does not seem to us to assume, as counsel claim, that the conductor had the authority from the appellant to employ the son.

Judgment affirmed.

BOY ASSISTING EMPLOYEE IN SWITCHING IN RAILROAD YARD RUN OVER AND KILLED — TRESPASSERS — VOLUNTEER — CHILDREN — DUTY OF RAILROAD COMPANY — WILFUL NEGLIGENCE — DAMAGES — PUNITIVE AND COMPENSATORY. — In **KENTUCKY CENTRAL R. R. CO. v. GASTINEAU'S ADM'R**, 83 Ky. 119 (*January Term, 1885*), where a boy, between fourteen and fifteen years of age, was run over and killed by one of defendant's cars which he was endeavoring to uncouple from a train, while switching in the defendant's yard, at the request of an employee, judgment for plaintiff in the Fayette Court of Common Pleas for \$5,000 was *reversed*, the syllabus to the official report stating the case (as per opinion by HOLT, J.) as follows:

"1. Trespassers upon the yard or track of a railroad company cannot recover of the company for injury unless it was wantonly inflicted after the danger was discovered.

"2. One who undertakes to assist an employee of a railroad company, at the request of the employee, does not thereby place himself within the protection of the company so that it is bound to anticipate and ascertain if he has placed himself in danger, unless the employee

has express authority from the company to make the request, or occupies such a position toward the company and the act to be done, that the authority can be fairly implied.

"3. One is bound to exercise reasonable care to *anticipate* and prevent injury to a child of such tender years as to have little or no discretion, although the child be a trespasser.

"In this case it was a question for the jury whether a boy about fourteen years of age, killed while uncoupling cars, from his age and experience, had discretion sufficient to recognize his danger and guard against it. If he had, being a trespasser, the company was not bound to *anticipate* and provide against peril to him.

"4. It was error to instruct the jury that if the defendant was guilty of wilful neglect they '*ought*' to award punitive damages. Nor was the error cured by telling them in another instruction that they '*could*' find any sum as punitive damages not exceeding the amount claimed in the petition.

"5. Wilful neglect is an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury.

"6. In fixing compensatory damages for loss of life the inquiry should be limited to the power of the deceased to earn money, had he not been killed, and the jury should not be directed to inquire as to the '*value*' of that power." (BRECKINRIDGE & SHELBY appeared for appellant; HARGIS & EASTIN for appellee.)

RAILROAD EMPLOYEE KILLED—WILFUL NEGLIGENCE—STATUTE—SPECIAL VERDICTS—PRACTICE—RESPONDEAT SUPERIOR.—In **CASEY'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.**, 84 Ky. 79 (*January Term, 1886*), judgment for defendant in the Shelby Circuit Court, notwithstanding special finding by jury in plaintiff's favor, was *reversed*. The points stated by PRYOR, J., were as follows:

"The condition of the railroad track at the time of the accident had nothing to do with this case. The appellant was suing under the statute for damages, on account of the death of his intestate, caused by the wilful neglect of the railroad company, its agents and employees. The jury, by a special finding, said that the death was caused by the wilful neglect of two of the brakeman, and assessed the damages at two thousand five hundred dollars. Upon such a finding the plaintiff was entitled to a judgment, and if there was no evidence to support the finding, instead of rendering a judgment for the defendant, the court should have set aside the verdict, and granted a new trial. We see no distinction in a case of this character between a special and a general verdict. If there had been no special verdict, but a general verdict, and that verdict not sustained

by the evidence, the motion for a new trial should have prevailed, and not a judgment for the defendant. So if the special verdict entitles the plaintiff to a judgment, the court should set it aside, and award a new trial. It is only where the special findings entitle the one party or the other to a judgment that the court is authorized to render it." * * *

"The right of recovery in this case depends upon the relation the deceased sustained towards the parties who are said by the jury to have caused, by their wilful neglect, the death of the intestate. A number of laborers were at work on the railroad, including the intestate, in transporting dirt on small truck cars a short distance, and were under the control of Collins and Aiken as section bosses. These small cars had, for brakes, rails that were inserted in a hole cut in the floor of the car, and when pressed against the wheel retarded the progress of the car. After loading the cars each one started off, the intestate on the first car, and several others after him on a down grade. The hindmost car seems to have run faster than the others, and running against the car next to it caused it to strike with force the front car, and the sudden jar knocked the intestate off his car, causing his death. The jury said the death was caused by the wilful neglect of the brakemen on the hind cars. They were called on to apply brakes when the velocity with which the hind car approached was discovered. This they neglected to do, and hence the injury. The only question in this case is, whether the intestate and these brakemen were common laborers in the same line of service, and the one required to risk the contingencies produced by the want of skill on the part of the other. If the appellant's intestate is to be treated as a mere laborer on the road, and the two parties as brakemen, in the exercise of such duties as pertain to that office on railroads, then the recovery for the death of the intestate may be properly based on the ground of wilful neglect. The proof, however, in this case, conduces to show that brakemen on these truck cars are not selected by reason of their skill or care out of the number constituting these common laborers. Any of them may get on the car acting as brakeman, it being a duty pertaining to all, and a right that each one can and does exercise, going first on the one car and then on the other. The jury do not find that the section bosses started these cars in too close proximity to each other, but that the loss of life was caused by the neglect of the two brakemen, and from the proof that one laborer was as much a brakeman as the other. If so, the risk is taken by these parties in the same field of labor and in the same grade of employment as to all injuries that may happen by the neglect of their co-laborers.

"In the *Louis., Cin. & Lex. R. Co. v. Cavens' Adm'r, etc.*, 9 Bush, 565, 15 Am. Neg. Cas. 154, *ante*, it is said: 'And it is equally as well

established that when a number of persons contract to perform service for another, the employees not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer.'

"So if the discharge of this duty as brakemen on the truck cars was common to all, then we see no reason for a recovery in this case. The statute giving a remedy for the loss of life caused by the wilful neglect of another is but enlarging the common-law rule, or providing a remedy unknown to the common law, but at the same time the doctrine of the text-books as to the liability of the employer for the acts of those in his employment, except as to the degrees of negligence, must prevail.

"To say that if the injury was caused by one in the employ of another in the exercise of that employment the employer is liable, regardless of the relation the wrongdoer and the injured party sustained towards each other at the time, is not the meaning or the purpose of the statute. The statute only gives a remedy for negligence causing the death of another that heretofore could not be maintained.

"This is unlike the case of *Louis. & Nash. R. R. Co. v. Collins*, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*. There the engineer of the train caused the injury to the common laborer, and on his skill and care the injured party had the right to rely." * * * Judgment reversed and new trial awarded.

RAILROAD EMPLOYEE RUN OVER BY LOCOMOTIVE — ALABAMA STATUTE — DAMAGES — LIFE TABLES. — In **LOUISVILLE & NASHVILLE R. R. CO. v. GRAHAM'S ADM'R**, (*February, 1896*), 98 Ky. 688, appeal from judgment for plaintiff in the Logan Circuit Court rendered on verdict for \$6,908.98, in action for death of plaintiff's intestate, an employee in defendant's service, who was run over by one of defendant's locomotives on its track, in Alabama, judgment was *affirmed*. The appeal was taken mainly on the question of the measure of damages, and the ruling is sufficiently stated in the syllabus to the official report as follows:

"1. Under the Alabama Code damages can be recovered of a railroad company for the killing of an employee as if he were a stranger, where the killing is caused by the negligence of any person in the service of the company who has the charge or control of any locomotive, car or train of the company. And to authorize the recovery it is not necessary to show either gross or wilful negligence.

"2. In an action under that statute [Alabama, Code, §§ 2590-2591] only the estimated actual money value of the life can be recovered.

with no allowance for physical pain or mental anguish suffered by the deceased, or *solatium* to the survivors on account of the bereavement. And as the decisions of the Alabama Supreme Court as to the measure of damages in such cases were given in evidence in this action brought in this State to recover for such a negligent killing in Alabama, that measure of damages is applied in determining whether the verdict is excessive. In this case the deceased was earning \$630 per annum, and under the American tables of mortality his probable duration of life was twenty-six and seventy-two one-hundredths years. He left infant children, but no widow. He was a man of more than ordinary health and vigor, and was sober, industrious, prudent and attentive to business. *Held*, that a verdict for \$6,908.98 is not excessive.

"3. An instruction given by the court telling the jury that the measure of damages is a fair and reasonable compensation for the 'power to earn money' destroyed by the death of plaintiff's intestate, is substantially the same as an instruction asked by defendant, and refused, to the effect that the measure of damages is a fair and reasonable compensation for the 'value' of the power to earn money."

The opinion in the Graham case, *supra*, was rendered by PAYNTER, J., who cited the following Alabama decisions on the measure of damages: *James v. Richmond & Danville R. Co.*, 92 Ala. 235; *Louis. & Nash. R. Co. v. Orr*, 91 Ala. 548, 13 Am. Neg. Cas. 60; *Louis. & Nash. R. Co. v. Trammell*, 93 Ala. 354, 13 Am. Neg. Cas. 140n. (WILBUR F. BROWDER appeared for appellant; BEN T. PERKINS, JR., and EDWARD W. HINES for appellee.)

NOTES OF KENTUCKY CASES RELATING TO ACCIDENTS TO RAILROAD EMPLOYEES.

Brakeman thrown by train against bridge — Assumption of risk.

In *JONES'S ADM'R v. LOUISVILLE & NASHVILLE R. R. Co.*, 82 Ky. 610 (January Term, 1885), brakeman while engaged in his duties killed by being thrown by train against a bridge, judgment for defendant was *affirmed*, on the ground of contributory negligence and assumption of risk.

Brakeman on top of freight train killed in contact with overhead bridge.

In *CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R'Y Co. v. SAMPSON'S ADM'R*, 97 Ky. 65 (January Term, 1895), action by the personal representative of James R. Sampson to recover for the loss of the life of his intestate, who was killed by coming in contact with an overhead bridge on defendant's road, while in the discharge of his duties as a brakeman in defendant's employ, judgment for plaintiff was *affirmed*. It was held that a railroad company is guilty of wilful negligence in having an overhead bridge on its road under which brakemen on the top of freight trains cannot pass without the exercise of more than ordinary care. The court cited several cases relating to overhead bridge accidents, among them being *Derby's Adm'r v. Kentucky Central*

R. Co., 9 Ky. Law Rep. 153; St. Louis, etc., R. Co. v. Irwin, 37 Kan. 701, 15 Am. Neg. Cas. 60, *ante*; Louis. N. A. & C. R'y Co. v. Wright, 115 Ind. 378, 14 Am. Neg. Cas. 488; Chicago & Alton R. Co. v. Johnson, 116 Ill. 206, 14 Am. Neg. Cas. 342n.

The doctrine in the SAMPSON case (preceding paragraph), was applied and followed in LOUIS. & NASH. R. Co. v. COOLEY'S ADM'R (Kentucky, February, 1899), 5 Am. Neg. Rep. 600.

Brakeman injured while between cars coupling same.

In LOUISVILLE & NASHVILLE R. R. Co. v. FOLEY, 94 Ky. 220 (January Term, 1893), brakeman injured while between cars coupling same, the negligence alleged being that of the conductor in signaling the engineer to back the locomotive, judgment for plaintiff for \$5,000 for loss of two fingers was *reversed* for excessive damages.

Brakeman injured while coupling freight cars.

In LOUISVILLE & NASHVILLE R. R. Co. v. WILLIAMS, 95 Ky. 199 (September Term, 1893), brakeman's arm and hand injured while attempting to couple two freight cars, judgment for plaintiff for \$3,500 was *affirmed*. The points decided in the opinion by PRYOR, J., are stated in the syllabus to the official report as follows:

"1. Where one railroad company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their conditions such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employees required to handle the cars, and when there is a patent defect, and an injury occurs to an employee by reason of the defect that is unknown to him, the company is responsible. And this rule applies not only where the foreign car is out of repair, but where it is patent that it is so constructed as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction.

"2. Although section 213 of the new Constitution requires railroad companies to receive for transportation cars belonging to other companies, still if such cars are so constructed as to render it unsafe to handle them in the ordinary mode, it is the duty of the company to refuse to receive them."

Brakeman injured on ladder of freight car — Car standing near track.

In MARTIN, ADM'R v. LOUISVILLE & NASHVILLE R. R. Co. ET AL., 95 Ky. 612 (January Term, 1894), an appeal from judgment on peremptory instruction to find for defendants in the Kenton Circuit Court, the points decided in the opinion by HAZELRIGG, J., are stated in the syllabus to the official report as follows:

"1. A railroad brakeman, engaged in coupling and uncoupling cars in the yard of the company, is not guilty of contributory negligence in riding on a ladder on the side of a freight car in going from one point of work to another.

"2. Where a track in the yard of a railroad company was reserved and kept clear for the use of another company, and the servants of the latter company left "dead" cars standing on the track in such close proximity to a track used by the former company as to come in contact with the body of a

brakeman riding on the ladder of a car moving on that track, resulting in his death, the latter company is liable.

"3. The company in whose yard the cars were left standing is not liable, as the engineer of the train on which the brakeman was riding at the time of his death could not discover the danger by reason of the darkness, and the 'dead' cars had not remained in their dangerous position such a length of time as to afford the yardmaster a reasonable opportunity of discovering the danger.

"4. The negligent engineer is liable directly for his own negligence and can not escape responsibility upon the ground that he was acting merely as agent for another." Judgment affirmed as to the railroad company, and reversed as to the other appellees.

Car-coupler injured — Projecting rails from car.

In *LOUISVILLE & NASHVILLE R. R. Co. v. COPAS*, 95 Ky. 460 (January Term, 1894), where car-coupler was injured by projecting rails from car improperly loaded by those whose duty it was to load the car, the railroad company was liable, and judgment for plaintiff was *affirmed*.

Car examiner or inspector killed on track.

In *LOUISVILLE & NASHVILLE R. R. Co. v. POTTS*, 92 Ky. 30 (September Term, 1891), railroad employee killed on railroad track, judgment for plaintiff for \$5,000 was *affirmed*. It appeared that plaintiff's intestate was standing on the main track taking the numbers of the cars on the side track, when defendant's train was moved on said track without warning and the intestate was killed.

Conductor falling from car — Defective ladder.

In *ILLINOIS CENTRAL R. R. Co. v. HILLIARD*, 99 Ky. 684 (September Term, 1896), conductor of freight train falling from car while descending from a ladder a round of which gave way, and hand crushed by the wheels, judgment for plaintiff in the Hickman Circuit Court was *affirmed*. The syllabus to the official report states the case as follows (per opinion rendered by LEWIS, J.): "The conductor of a freight train and one employed by a railroad company to inspect each car of a train and ascertain if it is in safe condition, are not fellow-servants in the sense of being upon a common footing and agents of each other. They acted in different spheres and neither could or was required to know whether the other did his duty." It was also held that there is a difference in the degree of care in examination of a car required of a car inspector, and that required of a conductor, and that while the conductor is required to examine the condition of a train before taking charge of it, he is not required to make a close inspection to discover a latent defect.

Section hand injured — Run over by hand-car.

In *JONES v. LOUISVILLE & NASHVILLE R. R. Co.*, 95 Ky. 576 (January Term, 1894), where employee operating a hand-car was knocked from and run over by it, owing to alleged gross negligence of the section boss, it was held that there was no evidence of negligence on the part of the railway company and judgment for defendant was *affirmed*. LEWIS, J., in his opinion said: "The

alleged negligence consisted in the section boss placing appellant [plaintiff below] at front end of the hand-car, the most dangerous position, for the purpose of working one of the levers, without informing him of the peculiar danger to which he was thereby exposed or instructing him how to avoid it, although he had been employed only a few days as a section hand and was unacquainted with the business of running hand-cars; and in the section boss placing or permitting to be placed loose upon the floor of the car, working tools, in the effort to avoid contact with which, while working the lever, appellant was struck by the lever and knocked from the hand-car and received the injury referred to."

Switchman stepping into hole in track — Run over by train.

In *NEEDHAM v. LOUISVILLE & NASHVILLE R. R. Co.*, 85 Ky. 423 (January Term, 1887), switchman killed by stepping into hole in track and thrown between moving cars, judgment for defendant in the Jefferson Common Pleas was *affirmed*, and rehearing overruled. It appeared that "it was the habit of switchmen, in taking trains into a depot, to run along a path at the side of the track, in which path was a dry well partially covered with a car door. Plaintiff's intestate, a switchman, stepped into this hole and was thrown between the moving cars and killed. His widow brought an action for wilful neglect, but the jury found that the deceased knew, and had known for years, the condition of the track."

LAWRENCE (BY NEXT FRIEND) V. HAGEMEYER & CO.

Court of Appeals, Kentucky, September Term, 1892.

[Reported in 93 Ky. 591.]

MINOR EMPLOYEE INJURED BY RIP-SAW — DEFECT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.—Where plaintiff, a boy sixteen years old, while operating a rip-saw in defendant's mill, had part of his hand cut off, owing to the defective condition of the apparatus connected with the saw, it was error to direct finding for defendant, as the question of whether plaintiff was negligent was for the jury to determine.

ORDINARY CARE REQUIRED OF MASTER.—It is the duty of the master not to expose the servant to hazards which may be guarded against by proper diligence upon the part of the master, but the latter is not bound to guarantee absolute safety.

ASSUMPTION OF RISK.—A servant assumes the ordinary risks incident to his employment, including the negligence of fellow-servants.

AGENTS OF CORPORATION NOT FELLOW-SERVANTS OF EMPLOYEES.—The officers and agents of a corporation are not fellow-servants of employees of the corporation, but represent the corporation, and the latter is liable for the acts of such agents in failing to observe the duties required of the master towards a servant.

DEFECTIVE MACHINERY—NOTICE TO FOREMAN—PROMISE TO REPAIR—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, upon discovering the defective condition of the saw, notified the proper agents of defendant company, and refused to use it unless it was repaired, and the foreman directed it to be done, and the party whose duty it was to repair same told plaintiff it was all right, the latter had the right to rely upon such statement, and was not negligent in continuing to use the same (1).

APPEAL from Pendleton Circuit Court. The facts appear in the opinion. *Judgment reversed.*

J. H. BARKER and L. P. FRYER, for appellant.

W. M. RARDIN and JAMES F. ELLIS, for appellee.

Holt, Ch. J.—The appellant, James A. Lawrence, while engaged as an employee of the appellee, a corporation, in operating a rip-saw in its mill had a part of his hand cut off; and he sues to recover damages upon the ground that the appellee, through those in charge of its mill, was guilty of gross neglect in having him use a saw unfit for use, and which was so unskillfully placed in position as to render its use dangerous, all of which was unknown to him at the time of the injury.

At the close of the testimony for the appellant the jury were, upon appellee's motion, peremptorily instructed to find for it.

It appears the appellant, a boy sixteen years old, was oper-

1. *On the question of liability of the master to comply with promise to repair, see the following case:* the syllabus to the official report, as follows:

In **BRECKENRIDGE COMPANY (LIMITED) v. HICKS**, 94 Ky. 362 (January Term, 1893), where a miner was injured by the fall of rock in defendant's mine, it appeared that the miner twice notified the "mining boss" of loose rock in the roof of the place where he was working, but the promise to repair not being complied with, the miner decided to quit work, and as he was leaving the mine some of the rock fell upon him. Plaintiff recovered a verdict and judgment for \$4,000, which, on appeal, was *affirmed*. The court (per **PRYOR, J.**) cited several cases as to liability of the master for failure to comply with promise to repair, the ruling being stated in

"Where the master is notified by the servant of a defect in the appliances or premises furnished for the servant's use, and promises to remedy the defect, the servant, by continuing in the master's service for a reasonable time after the promise to repair, does not assume the risk, and if by reason of the defect he is injured within that time the master is liable. The servant assumes the risk only where, with knowledge of the defect, he continues in his work without any promise upon the part of the master to repair, or where, although the master has promised to repair, such a length of time has elapsed since the promise was made that the servant has no right to believe that the master intends to comply with his promise."

ating a saw that had been in use for over eight years; that from age and inexperience he was unfamiliar with repairing such machinery; that the appliances which kept the saw in place were hid from view by a table, the saw only being visible; that they were worn out, which rendered the saw unfit and unsafe for use, and that the workman had to use his hand in running the boards through as he walked along the side of the table. The employment was quite hazardous.

A short time before the accident occurred the appellant found the saw did not run straight and steady; that it jumped and wobbled, and would pinch the boards as they went through; and he went to the person whose business it was to repair the machinery and told him of it, and requested its repair. The reply was that he did not have time.

The appellant then reported the matter to the foreman and declared he would quit work unless it was repaired. The foreman then said he would have it fixed, and directed the machinist to do so; and in a short time the latter came to the appellant and told him he had done so and that it was all right.

The appellant at once began work with it, but the saw pinched the second board and stopped it. The appellant's hand slipped off the board as he attempted to push it through, and against the saw, and was injured. These are substantially the facts of the case as shown by the testimony for the appellant.

It is the duty of the master not to expose the servant, when in the conduct of his business, to hazards which may be guarded against by proper diligence upon the part of the master.

The latter is not required to guarantee absolute safety or perfection of machinery or other apparatus provided for the use of the servant, but in furnishing and keeping them in proper condition he must observe all the care which the exigencies of the situation and nature of the business reasonably require for the safety of the servant. This is implied as a part of the contract for service. *Hough v. R'y Co.*, 100 U. S. 213.

It is also equally implied, however, that the servant agrees to take the natural and ordinary risks incident to the service, such, for instance, as arise from the negligence of his fellow-servants. The compensation is considered in law as being adjusted accordingly.

Considerations of justice and public policy require this

adjustment of rights and liabilities, and the difficulty arises in their application to the facts of the particular case.

While the master must use reasonable skill and care in providing the agencies to be used by the servant in the conduct of his business, yet the latter must act likewise in their use; because he ought not to be allowed to hold the master liable for injury resulting from his own reckless conduct. He ordinarily has no hand, however, in providing these agencies, or with keeping them in suitable condition, and he cannot, therefore, be understood as assuming, by his contract of service, any risks in these respects. This is the master's side of the business, and what is reasonable care in the matter upon his part is graded by the character of the business and the dangers incident to it. This rule applies to corporations as well as individuals. Where the employer is a corporation the duty must, of course, be discharged by its agents and officers; but in doing so they are not to be regarded as fellow-servants of those who operate these agencies. They are then performing the duty that the master owes to the servant, and represent the company. (Wharton on Neg., §§ 211, 212, 232a.)

It is said, however, that, viewed by the testimony for the appellant, an examination by him of the saw would have shown its unsafe condition; and that it was required of him to make it. as it was his duty to start and stop the saw.

Undoubtedly, if the employee, after discovering the defective condition of machinery furnished to him for his use, continues to use it without complaint or giving notice to the employer or the proper officers of a company, he would be guilty of such contributory neglect as would prevent a recovery for an injury arising from the defect. He would be regarded as having assumed the risk or danger arising from its defective condition.

In this case, however, the appellant, upon discovering by use the defective condition of the saw, notified the proper agents of the company, and refused to use it if it was not repaired. The foreman directed it to be done, and the party whose business it was to repair and care for the machinery reported to the appellant that it was all right.

In this matter the machinist and the foreman represented the corporation. For this purpose they were the company.

The testimony tends to show that when the appellant again began to use the saw its defective condition was not apparent. If so, he had a right to rely upon what the machinist said as to

its condition. It was in law the statement of the company. If the continued danger from its use was apparent to one in the exercise of ordinary care, then a continuation of the work by the appellant would constitute contributory neglect and prevent a recovery; but, otherwise, he had the right to assume that what the company's agent had said was true. In the latter case the use of the saw by him, although dangerous, was not contributory neglect upon his part.

This question the appellant had a right to have submitted to the jury, and it should have been done under proper instructions. The court refused to let the appellant state as a witness, whether, when he began working the saw after it had been reported to him as being all right, its defective condition was perceivable. This was error. If it was not apparent to one of ordinary care, then he had the right to rely upon the statement made to him and proceed with his work without an examination of its condition. He was not bound to hunt for a defect.

It is evident the injury was not the result of mere accident. It arose from the defective condition of the apparatus connected with the saw.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

KELLY (BY NEXT FRIEND) V. BARBER ASPHALT CO.

Court of Appeals, Kentucky, September Term, 1892.

[Reported in 93 Ky. 363.]

MINOR EMPLOYEE INJURED—CLOTHING CAUGHT IN REVOLVING SHAFT—CONTRIBUTORY NEGLIGENCE.—Plaintiff, a boy about seventeen years of age, was employed by defendant to perform all kinds of work in defendant's establishment. While plaintiff was drawing up some material from the first to the second story of defendant's building, under direction of the foreman, and while bending over a revolving shaft or windlass to draw up the buckets, his shirt caught in the revolving shaft, and one of his arms was broken. *Held*, that plaintiff was of sufficient age and intelligence to take notice of the ordinary operation of natural laws, and the failure to use his eyes was the cause of the injury, for which defendant was not liable (1).

1. In *AVERY & SONS v. MEEK*, 96 Ky. of age, while oiling a machine in defendant's plow factory had his hand crushed, judgment for plaintiff was

ASSUMPTION OF RISK.—An adult employee is not bound to engage in work that places his life in peril, and when labor of that sort is voluntarily assumed and an injury occurs he can not look to his employer for damages upon the ground of negligence if by the exercise of ordinary vigilance he could have avoided the accident.

DEGREE OF CARE REQUIRED OF MINOR EMPLOYEE.—In performing the duties of his place a servant is bound to take notice of any ordinary operation of familiar natural laws and to govern himself accordingly. He is also bound to use his eyes, and if he fails to do so he can not charge the consequence upon the master. And this rule applies to minor servants. (14 Am. & Eng. Ency. of Law, 842.)

APPEAL from Louisville Law and Equity Court. The facts appear in the opinion. *Judgment affirmed.*

J. M. CHATTERSON, O'NEAL, PHELPS & PRYOR, for appellant.
HUMPHREY & DAVIE, for appellee.

Bennett, J.—The appellant was in the employ of the appellee, and while he was drawing up some material from the first to the second story of the building by the direction of the appellee's foreman, and while he was bending over a revolving shaft or windlass in order to draw up the buckets containing the material, his shirt was caught fast to the revolving shaft and drew him around it, which caused one of his arms to be broken, and other bruises upon the body. He instituted this action against the appellee to recover damages for the injury, alleging that it was caused by the negligence of the appellee in having defective machinery, etc. Upon the conclusion of the appellant's evidence the court gave the jury a peremptory instruction

reversed for erroneous instruction as to notice of defect, the ruling of the court (per LEWIS, J.) being stated in the syllabus to the official report as follows:

"In an action by a servant against the master to recover for personal injuries received by plaintiff while engaged in oiling machinery, alleged to have been caused by a defect in the machinery, it was error to instruct the jury that if the machinery was defective and dangerous, and that this fact was known to defendant and not known to plaintiff, they should find for plaintiff. This instruction authorized a recovery by plaintiff even

though the injury may not have been caused by the alleged defect; and was also erroneous in that it assumed that plaintiff may not have known the machine was dangerous when he had seen it in operation daily during the six preceding months, and must have known it was dangerous to oil it in the manner and where he attempted to do so."

It was also error for the trial court to fail to instruct the jury that one servant cannot, for any less degree than *gross* negligence of a co-employee superior in authority, recover for an injury.

to find for the appellee. From that judgment the appellant has appealed.

The appellant, at the time of the accident, was in the seventeenth year of his age; was about five feet and eleven inches tall; weighed about 140 pounds; intelligent, used to working about machinery and sought work and made contracts of employment on his own account. The shaft or windlass mentioned was about two and one-half feet above the second floor, and over the edge of the floor, where there was an opening to the lower floor, from which the material was to be drawn in buckets to the second floor. The shaft was smooth, and was revolved by a leather belt which moved other machinery. In drawing up the buckets the appellant had to bend over the shaft. The buckets, with the material in them, weighed about forty pounds. While the appellant was bending over the shaft to draw up the third bucket of material — he having drawn up two buckets of it — his shirt, being loose and looped, got fastened to the shaft, and drew appellant to it and around it, causing the injuries mentioned.

The evidence is conclusive that the appellant was employed to perform any and all kinds of work that he was capable of performing about the establishment, that he was desired to perform. It also conclusively shows that he was not working with the shaft or windlass; but he was drawing up material with buckets, a work that any person possessing sufficient strength and ordinary sense could perform; that the shaft or windlass was not a defective or a particularly dangerous piece of machinery; that the appellant in performing his task had nothing to do with the shaft; he only had to bend over it while it was revolving right before his eyes, and which he was bound to see, and did see, while he was performing his duty. Not only did he see it then, but he knew before he commenced to draw up the buckets that the revolving shaft was there, and that others had drawn buckets of material up in the same manner that he did. He had good sense and was apparently stout enough to do the work, and having worked about machinery before at other places he evidently had some knowledge that it required some prudence and caution to work about machinery. It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off it, and that the common instinct of safety should have suggested to him to do that; and

the exercise of only ordinary prudence would have enabled him to do that. He had drawn up two buckets of material, and natural instinct would, and doubtless did, suggest to him whether or not the work was too heavy for him to perform with safety, and if it was too heavy, it was his right and duty to quit it, but he did not; and it looks reasonable that he thought he was adequate to the performance of the task, else he would have quit it. As said, he did see the shaft and that it was revolving, and that he would be compelled to bend over the shaft in drawing up the bucket, before he commenced to draw up the bucket; and he knew, as well as a country youngster would know, that if his clothes were caught by a revolving well windlass, he would likely be drawn to it and hurt, and that it was safest for him not to get close enough to it for such accident to befall him; or that there was danger of falling by walking on a plank covered with ice or sleet.

It is well settled by this court that an adult employee is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed, and an injury occurs, he cannot look to his employer for damages upon the ground of negligence, if, by the exercise of ordinary vigilance, he could have avoided the accident. (*Sullivan v. Louisville Bridge Co.*, 9 Bush, 81, 15 Am. Neg. Cas. 147, *ante*.)

The American and English Encyclopedia of Law, volume 14, page 842, gives the rule in reference to minor servants, which we think is correct, as follows: "In performing the duties of his place a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes, and if he fails to do so he cannot charge the consequences upon the master; and this rule applies to minor servants." See, also, the strong case of *Berger v. St. Paul, etc., R. Co.*, 39 Minn. 78 (1).

The above authorities settle the law as applicable to the employment of minor servants in a case like this. But there is no intimation intended as to the law of the case, where the master employed an infant and put him to work with machinery without instructing him, who, by reason of his tender years and inexperience, did not know anything about the danger incident to working with machinery, or would not be likely to

1. Reported with the Minnesota cases at end of this volume.

know or observe any defects therein. In this case, as said, the appellant was old enough, sensible enough and had experience enough "to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly" and to "use his eyes;" and his failure to do so was at his own peril.

The judgment is affirmed.

DEFECTIVE MACHINERY — EMPLOYEE INJURED — GENERAL VERDICT — SPECIAL FINDINGS — PRACTICE. — In **QUAID v. CORNWALL AND BROTHER**, 13 Bush (Ky.), 601 (*January Term, 1878*), it appeared that appellant (plaintiff below) was employed in defendant's candle and soap factory, and while at work was seriously injured by reason of some defect in the machinery, resulting in the loss of one of her eyes. On the trial the jury rendered a general verdict for plaintiff for \$500, and a special verdict was also returned, which latter the trial court regarded as inconsistent with the special verdict and rendered judgment for defendants on the special finding. On appeal the judgment was *reversed*, with directions to enter judgment for plaintiff on the general verdict. Petition for rehearing was overruled.

The points decided by PRYOR, J., in the **QUAID** case are set out in the syllabus to the official report as follows:

"1. Negligence in providing defective and insufficient machinery by employer renders him responsible for injuries sustained by employees by reason of such defective machinery.

"The proprietors of a candle and soap factory are held responsible for an injury — the loss of an eye caused by defective machinery — sustained by an employee who was required to work machinery that was defective and insufficient for the purposes for which it was used.

"2. Defective allegations in the petition were cured in this case by the answer.

"3. If a general and special verdict are inconsistent, judgment shall be rendered pursuant to the latter." (Code, § 328.)

"But the judgment should be rendered pursuant to the general verdict when the facts constituting the special finding are not inconsistent with the general verdict.

"The court below erred by entering a judgment on a special finding in this case, in response to an alternative question, which finding, it is held, was not inconsistent with the general verdict; and —

"The judgment on the special finding is reversed, with directions to enter a judgment pursuant to the general verdict.

"4. The Court of Appeals will presume, in the absence of a bill of evidence, that the lower court properly overruled a motion for a new trial on a general verdict.

"5. No bill of evidence is necessary to enable the Court of Appeals

to determine whether or not the several findings of the jury are in conflict the one with the other."

RAY v. JEFFRIES.

Court of Appeals, Kentucky, September Term, 1887.

[Reported in 86 Ky. 367.]

EMPLOYEE INJURED WHILE BLASTING ROCK—FAILURE TO INFORM HIMSELF AS TO USE OF EXPLOSIVES—CONTRIBUTORY NEGLIGENCE.—Where plaintiff was employed to blast rock in defendant's mine on account of his professional knowledge and skill in the business, at a fixed price per foot, the price to be increased when more dangerous powder was used, defendant having informed plaintiff that he himself had no knowledge or skill on the subject of the powder, and plaintiff was injured by his own negligence in the use of the material without first informing himself whether his manner of use of the same was safe or not, it was *held* that plaintiff's negligence in not informing himself how to safely handle the powder precluded recovery for the injury (1).

INADEQUATE DAMAGES—NEW TRIAL.—The rule as to when new trial may be granted for inadequate damages is stated in the opinion by LEWIS, J.

DANGEROUS MATERIALS—NEGLIGENCE OF EMPLOYEE.—Where an employee represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, and which, if not properly used, are liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskilful or negligent handling of them.

APPEAL from Hardin Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

J. P. HOBSON, WILSON & SPRIGG and JOHN L. SCOTT, for appellant.

MONTGOMERY & POSTEN, for appellee.

Lewis, J.—Appellant brought this action to recover for an

1. In *Downey v. Pence*, 98 Ky. 261 (September Term, 1895), it was *held* (as per syllabus to the official report) that "where a servant engaged in brazing, sharpening and repairing saws which required the use of a fire and forge had been warned by the master of the danger of doing his work in a room in which there was powder, and must also have known of the danger by seeing the powder, he can not recover of the master for injuries resulting from an explosion caused by his use of the room." It was also *held* that if the servant voluntarily and knowingly exposes himself to danger and is injured, he cannot recover. Judgment for defendant *affirmed*. Opinion by HAZELRIGG, J.

injury to his person while in the employ of appellee mining, but though the verdict of the jury was in his favor, they fixed the *damages at only one cent.*

Although it is provided in section 341, Civil Code, that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained," yet it has been held by this court (*Taylor v. Howser*, 12 Bush, 465) that "the reason of this rule does not apply to the assessment of the actual pecuniary damages resulting directly from the wrong," and that when the damages can be measured, and the injury is such as to demonstrate that as to the damages the proof and the law of the case were disregarded, a new trial ought to be granted.

The injury received by appellant was a severe and permanent one, and the damages actually proved were capable of being measured, and the verdict should have been set aside and a new trial granted, if he was entitled to recover at all. And whether he was or not is the question before us.

From the pleadings and evidence in the case, it appears that appellant was for some time, during the year 1884, employed by appellee in blasting rock, the ordinary blasting powder being used. But appellee mentioned to appellant, about the close of operations of that year, that he intended to procure material of greater explosive power, and was informed by appellant he had experience in the use of giant powder in blasting rock. Before commencing operations in the spring of 1885 appellee procured a quantity of what is called Atlas powder, in the composition of which a considerable per cent. of nitro-glycerine is used, and accompanying the powder, and to be used with it, were caps or exploders strongly charged with fulminate, and also fuse. The injury to appellant was caused not while he was actually engaged in blasting, though this would make no difference, nor by the explosion of the powder, which was in cartridges, but by the explosion of one of the caps, caused by him picking into it with a stick in order to ascertain whether the material it contained was fit for use.

The lower court instructed the jury that it was the duty of the defendant in operating the mining business to ascertain and know the character and quality of the material used for blasting, that is, whether or not it was dangerous, and to impart such information to the plaintiff, and if he failed to

obtain such information, or did obtain it and failed to impart it to the plaintiff, and he was injured by such failure, the defendant is liable. But if plaintiff knew of the dangerous character of the caps, then the defendant is not liable. They were also instructed that if the plaintiff did not know of the dangerous character of the caps, the defendant cannot be excused for his failure to know and inform plaintiff of the danger, unless he used reasonable care in obtaining and imparting such information. There is another instruction based upon the hypothesis that the defendant knew and intentionally concealed the information of the danger from the plaintiff. But as there is no evidence whatever to support such an instruction, it need not be considered.

The first instruction is objectionable principally because it is abstract and misleading.

There is no question that both parties knew of the dangerous character and quality of the material used in this case; for any one of ordinary intelligence knows that any explosive containing nitro-glycerine is extremely dangerous, and there is no pretense on the part of the plaintiff that he was ignorant on the subject.

The second instruction is wrong, because it might be, and probably was, understood by the jury as requiring the defendant to know and to inform the plaintiff, not merely of the dangerous character of the caps, but of the manner of using them so as to prevent any injury.

It is not alleged or shown that either the cartridge in which the powder was contained, the caps containing the fulminate or the fuse, was defective. And, consequently, the simple question is, whether an employer is bound in every case to know not merely the dangerous character of implements or agencies used in his business, but also the peculiar construction and mode of handling each part so as to make it most efficient, and to avoid injury to his employee, whether the latter is, or professes and undertakes to be, skilled in that branch of the business or not. To require of an employer such knowledge and skill, and impose upon him such obligation, would, in many cases, put a stop to business.

The owner of a mill operated by steam is bound to use due diligence and care in providing machinery free from defects, and a boiler capable of sustaining the pressure necessary to move it; but in regard to the mode of raising and regulating

the steam, so as to prevent an explosion and consequent injury, the employer is not required, but the engineer is required to know, and any injury the latter may sustain by reason of his want of the knowledge and skill he undertakes to possess is to be attributed to himself alone.

The correct rule is, that when an employee represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, and which, if not properly used, is liable to cause injury, he and not the employer is responsible for consequences resulting to himself from his unskilful or negligent handling of it.

In this case the plaintiff represented that he was a well-digger and blaster, and had used what is called Judson's blasting powder, containing a certain, though, as he testifies, not as large a per cent. of nitro-glycerine as the Atlas powder, and had used the caps and fuse in connection with it. On the other hand, the defendant informed the plaintiff he had no skill or knowledge on the subject. The plaintiff was employed to blast the rock in the defendant's mine or well on account of his professed knowledge and skill in the business, at a fixed price per foot, and the price was agreed to be increased when the more dangerous powder was substituted.

The injury to the plaintiff resulted from his own negligence in undertaking to stir the material in the cap, without first informing himself whether it could be safely done or not, as he testifies could be and had been done by him with the caps used in connection with the Judson powder.

There is proof by the merchant who sold the material to the defendant that he at the time gave him a pamphlet containing directions for the use of it. There is no question but such a pamphlet was at some time given to him, but it must have been done before the purchase. But whether at the time or before the sale, the evidence is that the plaintiff at one time had the same pamphlet in his possession, and could have informed himself of the nature and safe mode of using the Atlas powder. We do not, however, regard this as material, for he represented and agreed he possessed the skill and knowledge requisite to use powder containing nitro-glycerine and the cap accompanying it, and demanded increased price per foot on account of the increased risk; and it was his duty to inform himself, if he did not actually know, how to safely handle it; for the

defendant did not know, or agree to inform him, how to do so.

Being satisfied, from the uncontroverted evidence in this case and the law applicable to it, that the plaintiff was not entitled to a verdict, the judgment, appellee not complaining, must be affirmed.

FORT HILL STONE COMPANY v. ORM'S ADM'R.

Court of Appeals, Kentucky, January Term, 1886.

[Reported in 84 Ky. 183.]

EMPLOYEE FATALLY INJURED BY STONE CAR—NEGLIGENCE

OF CO-EMPLOYEE.—In an action by the personal representative of a deceased employee for damages for loss of the latter's life caused by alleged wilful neglect of the employer, it appeared that the defendant was the owner of a stone quarry on the side of a hill, at the foot of which was the machinery used for crushing stone. The stone when quarried was loaded upon trucks which were moved by hand to a turntable, and thence down an inclined track to the hopper-house at the foot of the hill, where the plaintiff's intestate was working. A number of men were employed at the turntable, one of whom received extra pay for special duty. The negligence of the latter seems to have caused a car or truck to descend with great rapidity as to fatally injure the plaintiff's intestate. *Held*, that defendant was not liable for the loss of life of plaintiff's intestate.

RESPONDEAT SUPERIOR.—When one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and when a number of persons contract to perform service for another, the employees not being superior or subordinate the one to another in its performance, and one is injured through the negligence of another, they are regarded as the agents of each other, and no recovery can be had against the employer.

APPEAL from Hardin Circuit Court. The case is stated in the opinion. *Judgment reversed.*

BUSH & ROBERTSON and J. P. HOBSON, for appellant.

MONTGOMERY & POSTEN, for appellee.

Lewis, J.—Appellee brought this action to recover for the destruction of the life of his intestate by the alleged wilful neglect of appellant's servants or agents, the intestate himself being one of them.

It appears from the evidence that appellant was the owner of a stone quarry on the side of a hill, at the foot of which, about seventy-five yards from the quarry, was located the

machinery for crushing the stone, which was transported thence by railroad to market.

Upon the same terrace where the stone was quarried was a track upon which cars or trucks loaded with stone were moved by hand to a turn-table, and thence by a track, descending at a grade of forty-five degrees or more, to what was called the hopper-house at the foot of the hill, and over the machinery for crushing the stone.

Two persons were employed in the hopper-house in transferring the stone from the cars to the hopper, and in seeing that the stone did not choke it, the intestate at the time he was killed being one of them.

About twenty feet above the turn-table was a friction pulley or drum, on which was a wire rope, one end of which was attached to the empty car at the hopper-house, and the other end intended to be attached to the loaded car before being shoved from the turn-table upon the track leading to the hopper-house, so that the former would be drawn up at the same time the latter would go down, the track being constructed so as to allow them to pass.

The drum was in charge of a single person, who received seventy-five cents per day in excess of that paid the other hands engaged in moving the stone, and it was his duty, when receiving a signal from one of the men in the hopper-house to let down a loaded car, to go forward to the front of the level on which the drum was situated, and if he saw the cable was fastened to the loaded car, and the car was all right to be let down, to give the signal to the men at the turn-table to push the car off.

It appears that it requires four or five men to push the loaded car from the turn-table to the top of the incline, it being the especial duty of one of them to hitch the cable to it, before it descends, who receives ten cents per day extra pay for that service.

According to the evidence of the man at the drum, they had been at work about one-half hour in the forenoon when he, being at his place at the drum, heard the men at the turn-table say "shove," whereupon he went forward to see what they were doing, and saw they were shoving the car off before the cable was hitched to it; that the front wheels of the car were near to or about gone over the top of the incline, and though he hallooed to them not to let it go, they continued to

push, and the result was that it descended with such rapidity and violence as to knock in one side of the hopper-house, and so severely injured the intestate that he died in a short time.

It is clear that the injury to the intestate was the result of the failure of the person whose duty it was to hitch the rope to the loaded car before it was pushed upon the incline. The testimony of that person is, that the other hands shoved the car off the turn-table so rapidly or suddenly that, though he tried to do so, he was unable to hook the rope to it before it went over the top of the incline.

The evidence does not authorize us to attribute negligence to the person in charge of the friction-pulley, for it appears that the car was started down the incline before he gave the signal, and, perhaps, in spite of his efforts to prevent it. Nor is it a matter of importance in what part of the hopper-house the intestate may have been when the car struck him, for his companion was also injured, and it would be hardly probable that any one in the hopper-house could escape injury under such circumstances.

The destruction of the life of the intestate being caused by the negligence of the persons whose business it was to shove the loaded car upon the incline, in failing to hook the rope to it, it is not material whether the negligence is to be attributed to the one whose especial duty it was to attach the cable, or to those with him, or to all of them.

It is shown that the machinery and appliances for moving cars upon the incline were in sound working condition, and that the man, by properly using the friction-pulley, could control the speed of the descending car, and let it go down to the hopper-house with comparative safety.

The single inquiry then is, whether appellant can be made liable under the statute for the destruction of the intestate's life, by the negligence of those whose duty it was to shove the car from the turn-table to the incline and to attach the cable to it.

The rule which has in similar cases heretofore been laid down by this court is, that when one enters into the service of another, he assumes to run all the ordinary risks pertaining to such service. And when a number of persons contract to perform service for another, the employees not being superior or subordinate the one to another in its performance, and one is injured through the negligence of another, they are regarded

as the agents of each other, and no recovery can be had against the employer. (Louis., Cin. & Lex. R. Co. v. Cavens, 9 Bush, 559, 15 Am. Neg. Cas. 154, *ante*; Doyle v. Swift Iron Works, 5 Ky. Law Rep. 59; Louis. & Nash. R. Co. v. Collins, 2 Duvall, 114, 15 Am. Neg. Cas. 138, *ante*.)

This rule has been so frequently applied in cases like the present by this court, and is so universally sanctioned by courts of other States, and the reasons for it appear to be so in accordance with public policy, that we do not feel authorized to disregard it.

The person or persons to whose negligence the death of the intestate in this case is attributable, had no right or power to control and direct him, nor can they be regarded as having been in any respect his superiors in the discharge of the duties pertaining to the business they were all engaged in, but were equal and co-ordinate, and, therefore, they and the intestate must be considered as the agents of each other.

Applying this rule, appellant cannot, according to the evidence before us, be held liable for the destruction of the life of appellee's intestate, not having, in legal contemplation or in fact, been guilty of the negligence that caused it; and as the record stands we think the peremptory instruction to find for the defendant ought to have been given.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

BOGENSCHUTZ v. SMITH.

Court of Appeals, Kentucky, September Term, 1886.

[Reported in 84 Ky. 330.]

EMPLOYEE INJURED BY MOLTEN IRON—DANGEROUS GANGWAY—KNOWLEDGE OF DANGER—DEFECTIVE PLEADING.

—Where plaintiff, while carrying a ladle of molten iron along a gangway in defendant's foundry, collided with another workman who was also carrying a ladle of the molten metal, and was injured by the molten iron pouring upon his leg and foot, it being alleged that the gangway was made dangerous by obstructions, which fact was known to defendant, it was *held* that the petition was defective in that it failed to aver plaintiff's want of knowledge of the danger, such averment being essential to the statement of a cause of action.

PLEADING—MATERIAL OMISSION.—A verdict may cure an ambiguity in pleading, but does not avail if there be an omission to allege a matter which is material to make out a cause of action.

ASSUMPTION OF RISK.—A servant assumes all the risks ordinarily incident to his employment, and where he has knowledge of extra risks and continues in the employment voluntarily after such knowledge, he cannot hold the master responsible for injuries resulting therefrom.

DUTY OF MASTER AND SERVANT—SAFE PLACE TO WORK, ETC.—But a servant is not bound in all cases to inform himself as to the safety of the premises or material to be used, as the master may have superior means of knowledge, and the circumstances may authorize the servant to rely upon the judgment of the master because of his own want of equal opportunity.

QUESTION NOT IN ISSUE—INSTRUCTION.—It is error to submit to the jury a question not in issue under the pleadings.

DEGREE OF CARE REQUIRED OF MASTER—INSTRUCTION.—It is error to submit to the jury the question of defendant's "want of care" in furnishing proper materials for the plaintiff, without defining the degree of care required.

APPEAL from Kenton Circuit Court. The case is stated in the opinion. *Judgment reversed.*

STEVENSON & GOEBEL, for appellant.

J. F. & C. H. FISK, for appellee.

Holt, J.—The alleged negligence of the employer toward the employee is in this instance confined by the petition to the alleged obstruction of the gangway in the foundry of the appellant along which the appellee, as a moulder in his employ, together with the other workmen, carried molten iron in ladles from the cupola, as it is called, to the moulding floors. It is claimed that certain vessels for holding iron were along or upon the margin of the gangway, and that they, or the handles to them, extended into it some two or three feet, it being from six to ten feet wide, and that the passage of the workmen with their ladles filled with iron was thereby rendered quite dangerous.

The appellee had worked in the foundry for the appellant for about four years; and it appears from the testimony offered by the former that the gangway had been obstructed more or less for a long time. It is not alleged in the petition that its condition was *unknown* to the appellee.

It is well settled that when one enters upon an employment he assumes all the risk ordinarily attendant upon it. If it be necessarily attended with danger, the servant undertakes to exercise ordinary care upon his part to avoid it.

The master must use ordinary care in providing proper and safe premises as well as proper machinery and material for the servant; but if, from any cause, it be not so, and the latter is

fully aware of it, and without complaint or assurance to him from the master that it shall be remedied, he voluntarily continues the use of them, then he waives his right in case of injury to hold the master responsible, and is without remedy. *Volenti non fit injuria*. Thus, where the master knew that a scaffold was defective and rotten, over which his servant was passing in his work, *not knowing* of the danger, the former was held liable for the latter's injury as occurring through the master's negligence. *Roberts v. Smith*, 2 Hurl. & N. 213 (1).

Also, where the employer knew that a ladder leading to his granary was defective and unsafe, and yet ordered his servant, *who was ignorant of its condition*, to carry corn up it, he was held responsible for an injury to the servant resulting from the defect in the ladder. *Williams v. Clough*, 3 Hurl. & N. 259 (2).

Shearman & Redfield on Neg., § 94, say: "It is obvious, however, that an employer may relieve himself of all common-law liability for accidents occurring to his servants through defects in materials or in the character of fellow-servants by giving explicit warning of such defects, and notice that he does

1. In *ROBERTS v. SMITH AND ANOTHER*, 2 Hurl. & N. 213 (Exch. Ch., 1857), the declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable or unnecessary risk or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke and the plaintiff fell to the ground. Pleas: 1. Not guilty. 2. Traverse of employment on the terms alleged. At the trial, it was proved that the de-

fendants had employed a laborer to erect the scaffold. The materials for the scaffold were in bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him not to break any more, that the putlogs would do very well. The laborer used such as he thought sound. One of the putlogs so used having given way the scaffold fell, and the plaintiff was injured. On this evidence, the judge at the trial directed a nonsuit. Held, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants. New trial was granted on the ground that the evidence appeared to show personal interference and negligence of the master.

2. In *Williams v. Clough*, 3 H. & N. 258, 259, the declaration stated that the defendant was possessed of a granary and a ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff

not intend to remedy them. For servants remaining after such a warning must be deemed to assume the risk for themselves as much as if it were one of the ordinary risks of the business. The courts have gone further than this, and hold that if a servant knows that a fellow-servant is habitually negligent, or that the number of servants employed is insufficient, *or that the materials with which he works are defective*, and continues his work without being induced by his master to believe that a change will be made, and without plainly objecting, he is deemed to have assumed the risk of such defects."

In *Wood on Master and Servant*, p. 791, we find this language: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1st. That the appliance was defective; 2d. That the master had notice thereof or knowledge, or ought to have had. 3d. That the servant did not *know* of the defect, and had not equal means of knowing with the master."

Thompson on Neg., vol. 2, p. 1008, says: "If the servant, before he enters the service, knows, or if he afterward discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service he may discover, that the building, premises, machine, appliance, or fellow-servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular; and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him.

* * * It may be stated as a general proposition that the master is under no higher duty to provide for the safety of the servant than the servant is to provide for his own safety. It follows that if the knowledge or the ignorance of the master and that of the servant in respect of the character of the machine are equal, so that both are either without fault or in equal fault, the servant can not recover damages of the master."

was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary; that the plaintiff, believing the ladder to be fit for use, and not knowing the con-

trary, did carry corn up the ladder into the granary, and by reason of the ladder being unsafe he fell from it. *Held*, that the declaration, without an averment that the plaintiff had no notice that the ladder was unsafe, was sufficient.

While the law imposes a duty upon the master, a correlative one is also upon the servant. He can not continue without objection to use a machine or premises known to him to be dangerous at the risk of the master.

This rule is well settled in England. In the late case of *Griffiths v. London & St. K. Docks Co.*, decided by the English Court of Appeal on June 24, 1884 [13 Q. B. Div. 259], it was held that in an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery or premises or materials provided by the master for the purposes of the work, it is necessary, in order that the plaintiff may succeed, to prove that the danger or defect which caused the injury was known to the defendant, and was not known to the plaintiff, and that a statement of claim, which does not allege both these facts, discloses no cause of action and is insufficient (1).

In this country it is not only supported by the text writers, but by the decisions of courts of high authority, and has been adopted by this court. *Laning v. R. R. Co.*, 49 N. Y. 521; *McGatrick v. Wason*, 4 Ohio St. 566; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541; *Buzzell v. Laconia M. Co.*, 48 Me. 113, 15 Am. Neg. Cas. *post*; *R. R. Co. v. Doyle*, 49 Tex. 190; *Sullivan's Adm'r v. Louisville Bridge Co.*, 9 Bush, 81, 15 Am. Neg. Cas. 147, *ante*.

We do not mean to decide that there may not be cases where the servant has a right to rely upon the judgment of the

1. In commenting on the rule as to pleading assumption of risk, Mr. Frank F. Dresser, in his recent work on "Employers' Liability and Assumption of Risk," cites the English case of *Griffiths v. London & St. K. Docks Co.*, 13 Q. B. Div. 259, 12 Q. B. Div. 493, as follows: "The rule is established in England that the plaintiff's statement of claim must allege knowledge of the condition on the part of the defendant, and want of knowledge on the part of the servant to make out his cause of action for risks, existing upon entry into the employment," and the learned author quotes from *Griffiths v. London & St. K. Docks Co.*, *supra*, the following: "Where it is an action by servant against his master for the wrongful condition of the machinery on the premises on which the plaintiff is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shows no cause of action. * * * The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant. Both these allegations are material, because without them there is no cause of

master as to the safety of the premises or material to be used; or that the servant is bound to inform himself as to them.

Thus it is in general no part of the duty of a brakeman to inspect the track of a railway or to know that it has been safely constructed. The master may have superior means of knowledge, and the circumstances may authorize the servant to rely on him because of want of equal opportunity. The servant may be ignorant without fault, while the master is negligently so. The law to be applied to a case must, therefore, depend upon the facts shown; but generally, if a servant knows that the material or machinery furnished him for work is defective and unsafe, or that the premises where he labors are dangerous, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master for injury therefrom.

The petition in this case is somewhat indefinite. It does not clearly appear whether the pleader intended to allege that the injury resulted from the act of a fellow-laborer, caused by the neglect of the master in not providing safe and proper premises, or simply that the injury was caused by the alleged improper obstruction of the gangway. Construing it, as we must, most strongly against the pleader, the latter construction must be adopted; and it was essential to the sufficient statement of the alleged cause of action that it should have been stated that the alleged defective condition of the gangway was *unknown* to the appellee.

This defect in the petition was not cured by the answer or the verdict. The averment of a want of knowledge was essential to the statement of a cause of action.

action, and unless it was proved at the trial directly, or that there were facts from which it might be inferred, that the servant was ignorant of the existence of the danger, he would be non-suited." The author states that the same rule is adopted in Indiana. [Dresser's Employer's Liability, p. 388, § 87.]

In a note in 1 Shearm. & Redf. on Negl., p. 395, § 222 (5th ed.) is the following comment: "In Griffiths v. London & St. K. Docks Co., 12 Q. B. Div. 493; aff'd in 13 Q. B. Div. 259, the 'statement of claim' was held in-

sufficient for want of an allegation that the danger was known to the master and unknown to the servant. On this ground, Seymour v. Maddox, 1 Q. B. 326, may be sustained in England. On the merits, we think it could not be. It was questioned in Ryan v. Fowler, 24 N. Y. 410. Neither case is good law in the United States, except in Indiana."

See, also, the case of Birmingham R'y & C. Co. v. Allen, 99 Ala. 359, reported in 13 AM. NEG. CAS. 77, for English cases on the doctrine of *volenti non fit injuria*.

It is true, contributory neglect was pleaded as a defense; but it is purely a matter of defense, and cannot supply an allegation essential to the statement of a cause of action. As to one the burden of proof is on the plaintiff, while as to the other it is on the defendant. A verdict may cure an ambiguity in pleading, but does not avail if there be an omission to allege a matter which is material to make out a cause of action.

The following were the first, second and fourth instructions given to the jury:

"The court instructs the jury that if they believe, from all the evidence in this case, that at the time the plaintiff was burned, the gangway in defendant's foundry was obstructed by ladles or other utensils, so as to be rendered too narrow for the safe passage of plaintiff and other piece-workmen in the employ of defendant, and if they believe from the evidence that the defendant or his superintendent or cupola boss, or workmen under charge and direction of defendant, his superintendent or cupola boss, caused said gangway to be so obstructed, or if said defendant, his superintendent or cupola boss, knew that said gangway was so obstructed, and permitted the same to remain, or if, by the use of the reasonable skill and diligence of an ordinarily prudent person, could have known that said gangway was so obstructed, and that defendant, his superintendent or cupola boss, could have known of said obstructions in said gangway, said defendant, his superintendent or cupola boss, permitted the same to remain in or upon said gangway, and that because of said obstructions in said gangway the plaintiff was burned without contributory negligence on his part, as defined in instruction No. 6, then the jury must find for the plaintiff such compensatory damages as they shall, from all the evidence, find he has sustained, not exceeding the sum of \$12,500, the amount claimed in the petition."

"If the jury believe, from all the evidence, that the plaintiff was, at the time mentioned in the petition, working for the defendant in his foundry, and that while so working for the defendant at piece work he was injured by molten iron poured upon him from the ladle of another hand also working for defendant; and if they further find that the ladles so used by said hands so working by the piece for defendant were prepared and delivered to said workmen by the defendant, his superintendent or cupola boss, and that said ladles were not

properly prepared for such use by said superintendent or boss, by want of care of the latter, or from a defect in the drying apparatus unknown to the plaintiff; and that the gangway prepared by defendant or his superintendent, over which the men so working for defendant ordinarily passed with their ladles filled with molten iron, was obstructed or permitted to be obstructed by the defendant, his superintendent or other boss, or day hands in defendant's employ and under his direction, so that same was left in a condition too narrow for workmen to safely pass with ladles filled with molten iron; and that while so passing along said gangway, and because said ladles were not properly prepared for use, and because said gangway was so obstructed, the plaintiff, while in the exercise of such care as a man of ordinary prudence would use under the circumstances, the ladle of the plaintiff and another workman collided, and the molten iron from one of said ladles was thereby poured upon plaintiff's leg and foot, and he was injured by the molten iron being so poured upon his leg and foot, the jury must find for the plaintiff such damages as he has suffered therefrom, not exceeding the sum of \$12,500."

"If the jury believe, from the evidence in this case, that the injury to plaintiff was caused by or resulted from gross negligence on the part of defendant, his superintendent or cupola boss, in the management of defendant's foundry and in obstructing said gangway, or permitting it to remain obstructed after they knew, or could by the exercise of ordinary care and prudence have known, that the same was obstructed, and too narrow for the safe passage of plaintiff and the piece workmen in defendant's employ, as set out in instruction No. 1, then the jury may, in addition to the compensatory damages mentioned in said instruction No. 1, find for plaintiff punitive damages not exceeding in all the said sum of \$12,500, the amount claimed in the petition."

The defect in the petition already pointed out was carried into the first instruction. It improperly failed to incorporate the idea, or to submit to the jury the question whether the obstruction in the gangway was known or unknown to the appellee.

The second instruction is objectionable in several respects. It allowed the jury to consider whether the ladles in which the iron was carried were defective in construction, or whether the apparatus for drying them was sufficient, when these matters

were, under the pleadings, not in issue. It submitted to them whether, through "want of care" upon the part of the appellant, the ladles were not defective, without defining the degree of care to be exercised by the appellant in their preparation. The jury were left to determine whether he was bound to use extraordinary or only ordinary care as to them and the drying apparatus; also leaving out of view the question whether, if defective, he could, by the exercise of ordinary care, have discovered it. It, moreover, also ignored the question of knowledge of the condition of the gangway upon the part of the appellee.

No instruction as to the fitness of the ladles or drying apparatus should have been given, for the same reason that rendered it improper to submit to the jury in the fourth instruction the question whether the injury resulted from gross negligence "in the management of defendant's foundry"—these matters were not in issue by the pleadings—and the last-named instruction appears to have improperly assumed that the obstruction of the gangway, whether much or little, constituted gross negligence.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

THE ADDYSTON PIPE AND STEEL COMPANY v. COPPLE.

Court of Appeals, Kentucky, January Term, 1893.

[Reported in 94 Ky. 292.]

RECEIPT IN FULL SETTLEMENT FOR PERSONAL INJURIES—MISTAKE—BURDEN OF PROOF—ERRONEOUS INSTRUCTION.—In an action to recover damages for personal injuries sustained by plaintiff while in defendant's employ, the defense relied upon a written contract signed by the plaintiff acknowledging the receipt of a sum of money from defendant "in full settlement of all claims" against defendant on account of said injuries. *Held*, that it was error for the trial court to charge that the burden of proof was upon defendant to show that plaintiff "understood and fully assented to the agreement as a settlement of claim" for damages, the presumption being that plaintiff so understood it, and he is bound by it, unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence.

APPEAL from Campbell Circuit Court. The case is stated in the opinion. *Judgment reversed.*

NELSON & DESHA, for appellant.

C. J. HELM and CLEARY & CLEARY, for appellee.

Bennett, Ch. J.—The appellee brings this suit against the appellant to recover damages for the loss of a leg, caused by the gross neglect of the appellant in knowingly having defective machinery for the appellee to work with while in its employment, and of which defect the appellee did not know, and which defect caused the machinery to give way and broke the appellee's leg. The appellee recovered \$4,500 damages for said injury. The appellant has appealed from that judgment.

The appellant traversed the allegation of defective machinery and negligence. It pleaded the further fact that appellee, before the institution of his suit, accepted \$100 in money and an artificial leg in full satisfaction of said injury. The appellant relied on a written contract, which reads as follows:

"Received from Addyston Pipe and Steel Company the sum of one hundred dollars, in full settlement of all claims of whatsoever kind or character, caused by, or in any wise growing out of, an accident to me, Henry Copple, on or about the 29th day of October, 1889, at pit No. 3, Newport Works, Newport, Ky.

"In testimony whereof, I have hereunto set my hand, this the 17th of February, 1890.

"Henry Copple."

"We also agree to furnish said Henry Copple with a good and serviceable artificial limb."

The appellee admits the agreement, but says that the appellant procured it from him by fraud, etc. He does not allege mistake as to the contents of the writing. The court instructed the jury in instruction No. 4 that they must find for the appellant, if the appellee, at the time he signed the agreement, "understood and fully assented to the same as a settlement in full of his claim for damages herein." Instruction No. 7 informs the jury that "the burden is on the defendant to make out its case by a preponderance of proof of the said settlement with the plaintiff under the fourth instruction herein." The other instructions place the burden upon the appellee as to the allegations of fraud. The instructions, taken together, mean that the burden of proof was upon the appellant, to show that the appellee "understood and fully assented to the agreement as a settlement of claim" for dam-

ages, and that the burden was upon the appellee to show that the agreement was obtained by fraud.

The writing signed by the appellee means that the damages caused by the injury complained of were fully settled by the acceptance of \$100 in money and the artificial limb. And the presumption is conclusive that the appellee thus understood it, and he is bound by the writing with that meaning, unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence. Therefore, the instruction throwing the burden upon the appellant to show that the appellee "understood and fully assented" to the writing is erroneous.

The judgment is reversed, and the case is remanded for a new trial.

Liability of employer for negligence of independent contractor.

In **JAMES'S ADM'R v. McMINIMY**, 93 Ky. 471 (*September Term, 1892*), where plaintiff's intestate was injured by blasting, judgment for defendant in the Mercer Circuit Court was *reversed*, the case being for the jury to determine. The opinion was rendered by BENNETT, J., and the rulings are summarized in the syllabus to the official report as follows:

"1. Where an independent contractor undertakes to perform work for the employer's benefit which the employer, as a prudent man, has reason to believe is, in the ordinary mode of doing it, a nuisance, the employer is liable for any injuries that may result to third persons. But where he has no reason to believe that the act contracted to be done is a nuisance, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the employer is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But upon receiving such notice he must, in order to protect himself, take such reasonably prompt and efficient means as are in his power to suppress the nuisance. (Citing *Robinson v. Webb*, 11 Bush, 464, 480.)

"2. Blasting with gunpowder in a city or town near enough to the property of others to do injury is a nuisance, unless proper precautions are taken to prevent injury to the property of others within its reach, or to the persons of others ignorantly coming within its reach."

ROBINSON AND ANOTHER v. WEBB, 11 Bush (Ky.), 464, turned on the questions of liability of owner and independent contractor, for injuries to property occasioned by the fall of a building.

ROBINSON ET AL. v. SPEED, 11 Bush (Ky.), 464, 484, was an action arising out of the same accident as in the Webb case, *supra*, and was decided with the Webb case on the opinion rendered in that case.

LIST OF MASTER AND SERVANT CASES REPORTED OR DIGESTED IN THE KENTUCKY LAW REPORTER.

[*Note*.—Numerous cases are reported or digested in the several volumes of the KENTUCKY LAW REPORTER, many of which do not appear in the Kentucky State Reports. For the convenience of the practitioner, the EDITOR of AM. NEG. CAS. has summarized the Master and Servant cases in the KENTUCKY LAW REPORTER, which are digested in the KENTUCKY DIGESTS. The following paragraphs comprise a list of Master and Servant cases which appear in the KENTUCKY LAW REPORTER, the cases reported in the Court of Appeals and in this volume of AM. NEG. CAS., being omitted from the list.]

Defective appliances, machinery, etc.

Sturm v. Mayer, 12 Ky. Law Rep. 350; *Lostutter v. Dailey*, 14 Ky. Law Rep. 926; *Ohio Valley R'y Co. v. McKinley*, 16 Ky. Law Rep. 445; *Hooper v. Snead Iron Works*, 12 Ky. Law Rep. 483; *Louis. & Nash. R. R. Co. v. Binder*, 16 Ky. Law Rep. 841; *Reinder v. Black & Phillips Coal Co.*, 12 Ky. Law Rep. 30; *Baird v. Deering*, 13 Ky. Law Rep. 271; *Chesapeake, Ohio & S. W. R. Co. v. Bell*, 6 Ky. Law Rep. 219; *White House Coal Co. v. Cochran*, 13 Ky. Law Rep. 636; *Norton v. Louis. & Nash. R. Co.*, 16 Ky. Law Rep. 846; *Mud River Coal Co. v. Williams*, 15 Ky. Law Rep. 847; *Louis. & N. R. Co. v. Miller*, 15 Ky. Law Rep. 655, 699; *McDowell v. Chesapeake, Ohio & S. W. R. Co.*, 10 Ky. Law Rep. 209.

Minor employees.

Louisville Bagging Co. v. Dolan, 13 Ky. Law Rep. 493; *Peerless M'fg Co. v. Denham*, 15 Ky. Law Rep. 95; *Sinclair v. Elizabethtown Milling Co.*, 13 Ky. Law Rep. 120; *De Lozier v. Ky. Lumber Co.*, 13 Ky. Law Rep. 818; *Briggs v. Newport News & M. V. R. Co.*, 15 Ky. Law Rep. 618; *Baird v. Deering*, 13 Ky. Law Rep. 271.

Miscellaneous.

Newport News & M. V. Co. v. Eifert, 15 Ky. Law Rep. 575, 600 (contract exempting railroad company from all liability for negligence is void as against public policy).

Peerless M'fg Co. v. Dorcham, 15 Ky. Law Rep. 95 (machinery; duty to instruct as to danger).

Lillard v. Mary, Houston Transfer Co., 4 Ky. Law Rep. 254 (order to servant placing him in position of danger; assumption of risk); see, also, *Flahiff v. Louis. & Nash. R. Co.*, 9 Ky. Law Rep. 398.

Chesapeake, etc., R. Co. v. Thierman, 15 Ky. Law Rep. 655 (no presumption of negligence from injury alone; negligence must be alleged and proved).

De Lozier v. Ky. Lumber Co., 13 Ky. Law Rep. 818; *O'Bannon v. Louis. & Nash. R. Co.*, 9 Ky. Law Rep. 706; *Louis. & Nash. R. Co. v. Shivel*, 13 Ky. Law Rep. 902; *Doyle v. Swift Iron & Steel Works*, 5 Ky. Law Rep. 59; *Kelly v. Shelby R. R. Co.*, 15 Ky. Law Rep. 311 (on the question of assumption of risk).

Louis. & Nash. R. R. Co. v. Davis, 14 Ky. Law Rep. 716; *Louis. & Nash. R. R. Co. v. Hoskins*, 14 Ky. Law Rep. 717 (as to rules and regulations).

Respondeat superior — Fellow-servants.

On the rule of *respondeat superior* and the question of fellow-servants, see the following cases: *McLellan Stone Co. v. Barlow*, 14 Ky. Law Rep. 621; *Ritt v. Louis. & Nash. R. Co.*, 9 Ky. Law Rep. 307; *Chesapeake, Ohio & S. W. R. Co. v. McMahon*, 10 Ky. Law Rep. 248; *Louis. & N. R. Co. v. Cable*, 9 Ky. Law Rep. 439; *Newport News & M. V. Co. v. Eifert*, 15 Ky. Law Rep. 575, 600; *Doyle v. Swift Iron & Steel Works*, 5 Ky. Law Rep. 59; *East Tenn., etc., R. Co. v. Campbell*, 15 Ky. Law Rep. 813; *Louis. & Nash. R. Co. v. Rains*, 15 Ky. Law Rep. 626; *Robinson v. Louis. & N. R. Co.*, 15 Ky. Law Rep. 626; *Greenwood v. McHenry Coal Co.*, 14 Ky. Law Rep. 336; *Coffman v. Louis. & Nash. R. Co.*, 13 Ky. Law Rep. 866; *Osborne v. Penn. Co.*, 10 Ky. Law Rep. 970; *Wagner v. Wetmore*, 12 Ky. Law Rep. 638; *Louis. & N. R. Co. v. Hoskins*, 14 Ky. Law Rep. 717; *Ky. Cent. R. Co. v. Ryle*, 13 Ky. Law Rep. 862; *Louis. & Nash. R. Co. v. Sheets*, 11 Ky. Law Rep. 781; *Red River Lumber Co. v. Newkirk*, 12 Ky. Law Rep. 635.

Torts of servants — Liability of master.

See *Lackat v. Lutz*, 94 Ky. 287, 15 Ky. Law Rep. 75 (master not liable for act of servant in directing a stranger into a dark room on premises not used as a passageway for strangers whereby stranger is injured by falling into unguarded opening).

Speed v. Carpenter, 14 Ky. Law Rep. 271 (owner of building liable for negligence of janitor whereby person is injured by falling over roll of wire matting in passageway from elevator to the door).

City Transfer Co. v. Robinson, 12 Ky. Law Rep. 555 (master liable in exemplary damages for reckless or wanton negligence of servant).

Licking Rolling Mill Co. v. Fischer, 7 Ky. Law Rep. 602, 8 Ky. Law Rep. 89 (master liable for wilful act of servant, if act be within scope of employment); see, also, *Garrison v. Daniel*, 15 Ky. Law Rep. 749.

POLLICH ET AL. V. SELLERS AND COMPANY.

Supreme Court, Louisiana, May, 1890.

[Reported in 42 La. Ann. 623.]

DEMOLITION OF BUILDINGS — FATAL ACCIDENTS — NEGLIGENCE — BURDEN OF PROOF — ASSUMPTION OF RISK — KNOWLEDGE OF DANGER.—1. When the plaintiff proves that the defendant's negligence has caused the injury, the defendant may prove that the plaintiff, by his want of care, contributed to the cause of the injury, and that he, by the exercise of ordinary prudence, might have avoided the accident and the injury.

2. The employer, although not blameless, can not be made to answer for all accidents without regard to the care the employees should have exercised. To recover, there must not be any wilful contributory cause on the part of the injured.

3. An employee should not voluntarily expose himself to imminent and apparent danger. If he does and suffers injury the negligence of the

defendant will not excuse his imprudence and the consequence of his rashness.

4. The employee, by remaining in the employer's service after the discovery of imminent and threatening danger incident to his work, is deemed to have assumed the risk.

(*Syllabus by the court.*)

APPEAL from the Civil District Court, Parish of Orleans. The case is stated in the opinion. *Judgment affirmed.*

HARRY H. HALL, for plaintiffs (appellants).

RICE & ARMSTRONG, for defendants (appellees).

Breaux, J.—The causes of the fatal accidents, whereby three men lost their lives, while at work, in demolishing the exposition buildings in this city, are fully recounted in two cases decided by this court.

The first case, that of *Mrs. John Faren v. T. J. Sellers*, 39 La. Ann. 1011, is similar in many respects to the case at bar. John Faren, whose death gave cause for this suit, met his death two days before *Casey* [*Carey*] and *Pollich* fell.

In the case of *Faren*, the injury was occasioned by the fall of a purline, which slipped from its support and precipitated him some seventy-five feet to the ground. The defect was not patent. It was therefore held that he had not assumed the risk incident to the service.

In the case of *Casey* [*Carey*] reported in 41 La. Ann. 500, the injury was occasioned by the falling of a row of trusses under which he was working. The building had been stripped to the danger point; the purlines or rafters had been taken down; the skeleton of the structure remained.

In this case the accident was occasioned by the falling of the timbers that killed *Casey* [*Carey*] at the same time that it occasioned the death of *Pollich* (1).

1. The cases arising out of the same accident as the case at bar, namely, *FAREN v. SELLERS*, 39 La. Ann. 1011, and *CAREY v. SELLERS*, 41 La. Ann. 500, are sufficiently stated in the opinion in the case at bar. It will be noted that the latter citation is given as the *CASEY* case, which is so cited throughout the opinion in the *POLLICH* case, and the same is accordingly followed in the report of the case in this volume, but the official

report of the case is *Carey*, as cited below.

FAREN (widow and tutrix) *v. SELLERS & Co.*, 39 La. Ann. 1011 (December, 1887), resulted in verdict and judgment for plaintiff. *Affirmed.*

CAREY (widow and tutrix) *v. SELLERS & Co.*, 41 La. Ann. 500 (May, 1889), resulted in *affirmance* of judgment for defendant.

See, also, the following case arising out of an accident at the exposition

The status and the extent of defendants' fault are established.

Only the question of contributory negligence is to be settled at this time.

Complete statement of the facts having been made in the decisions reported, it only remains necessary to state those not proven in those cases.

The deceased was working on the loft of the building, taking down the trusses, on the 13th of August, 1886. Lynch, his employer, who had contracted with the defendants to take down what remained standing of the main building and the government building, in the prosecution of his work, had advanced a derrick to the trusses and had commenced taking down from Magazine street toward St. Charles street. The derrick was made secure by wire guys. Those on the side of the building were placed under the trusses. They extended from near the top of the derrick to the ground, and were made secure below at a point under the trusses known to be insecurely attached to the building. A row of trusses fell; one of them fell upon the guys which held the derrick in place. They had been so weakened by the stripping of the building that they fell of their weight, without the least touch. The span nearest to the derrick was attached and swung to it, and was about to be lowered to the ground. While the span or truss was so attached and swung to the derrick, one of the inside trusses suddenly fell, carrying down other trusses, one of which fell on the guys which held the derrick in position, and carrying down with the derrick the span attached and which was about to be lowered to the ground. At the time the derrick fell Pollich was standing on the truss which was swung to it. The fall carried him down and was the occasion of his death.

The dangerous condition of the building and the danger incident to the work of demolishing it, at that particular time, are settled questions.

It only remains to be ascertained whether the fall of the trusses on the wire guys and the consequent fall of the derrick

buildings (in which the defendant's name is spelled *Sellars*).

In *SMITH v. SELLARS & Co.*, 40 La. Ann. 527 (May, 1888), where an employee was injured by a falling joist while engaged in the demolition of exposition buildings, it was held that the injury was the result of an acci-

dent for which the defendant was not liable. It was held that a servant assumes the ordinary risks of employment, and also extra risks of remaining in service when he has knowledge of danger. An employer does not guarantee an employee against injury from accidental causes.

were accidents which the deceased by ordinary care could have foreseen and which he might have avoided.

In Casey's [Carey's] case this court has decided, that he, Casey [Carey], might, by the exercise of ordinary care, have avoided the consequences of defendant's negligence, and that he, by his own act, contributed to the injury.

In the case at bar the danger was more imminent and apparent. Casey [Carey] was below at work when the trusses fell upon him. Pollich at the time was aloft in a position which at once suggests imminent peril. There was fatality in the imprudence of trusting his weight on a derrick secured by wire guys placed under insecure trusses, of an unsafe building at an elevation of seventy-five feet from the ground.

After the first fatal accident, which had resulted in the death of Faren, two of the men left the work. They refused to expose themselves longer to the threatening danger. It had been discussed; the men were warned. Pollich had been at work about three weeks. The large structure had been made quite unsafe by stripping. It was the part of an ordinarily prudent man to take needful precaution at every step of the work. In continuing he assumed a risk of which he was informed or of which he would have been informed had he given himself the concern required by ordinary prudence. He must have known of the defect and danger.

It is held that the servant, by remaining in the master's employment after discovery of the defect or after knowledge, is deemed to have assumed the risks incident to the service and to have waived any claims for damages in case of injury. Whitaker's Smith on Neg. (note), p. 397.

The causal connection between the employer's negligence and the injury is broken, at the time the danger becomes so plain, that a person of ordinary care would not assume the risk of continuing to work at the place of danger.

Judgment affirmed.

ENGINEER INJURED WHILE COUPLING CARS — REQUEST BY CONDUCTOR — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — DAMAGES.— In **BOMAR v. LOUISIANA NORTH AND SOUTH R. R. CO. et al.**, 42 La. Ann. 983 (October, 1890), where locomotive engineer in defendant's employ was injured while attempting to couple cars, judgment for plaintiff for \$15,000 was reduced to \$2,000 and, as amended, was

affirmed. The facts are stated in the opinion by BREAUX, J., as follows:

"The plaintiff was in the employ of the defendant company, which owns and operates a railroad a distance of eighteen miles from Gibbs to Homer. It received its cars from the Vicksburg, Shreveport and Pacific R. R. Co., and made up its trains on the latter's side track. At the Gibbsland junction the two companies had the same depot agent and freight clerk, who had control of the switches, side-tracks, freight cars and freight of both companies. The employees in the movement and transfer of freight and cars were under the authority of this agent. The trains of the company were under the control of the conductor.

"On October 8, 1888, the plaintiff attempted to couple two cars. The drawhead of one of the approaching cars being out of repair and forced under the car, in attempting to direct the link into the drawhead of the stationary car, his hand was caught between the bumpers and severely injured. He was employed as locomotive engineer in the service of the defendant.

"The road having been lately constructed and being a short road, owned by a company recently organized, the number of employees was limited, and at times an officer or hand was called upon to do other work than that belonging to his charge. The conductor testified that on the morning the accident occurred, being sick, he asked the plaintiff to make up the train for him." * * *

After reviewing the case the court held that plaintiff was not guilty of contributory negligence.

On the question of damages the court said: "We cannot agree with the jury in this case. The usefulness of plaintiff's hand is not entirely impaired. His suffering has been great; nevertheless justice requires, where the negligence of the company has not been wanton and malicious, that damages allowed be within reasonable limits. Plaintiff is forty-three years of age. His salary at the time he was wounded was \$60 a month. It is not probable that it would have increased much. His hand and arm are not completely disabled, although badly injured. He has had charge of an engine since the injury with aid furnished him for the heavy work. The defendant company has been organized not long since, evidently with limited means. The amount allowed as damages is not a profit nor an advantage. It is fixed at what is deemed to be reasonable under the circumstances. After considering the evidence carefully, we fix the amount of damages at \$2,000.

"It is therefore adjudged and decreed that the verdict and judgment of the court *a qua* be amended, reducing the amount from \$15,000 to \$2,000, and that as amended the judgment be affirmed without interest, except five per cent from date of the amending judgment."

The syllabus by the court in the BOMAR case, *supra*, is as follows:

"Contributory negligence is the want of ordinary care and prudence without which the injury would not have occurred.

"It is the employer's duty to provide suitable appliances. If they are defective, and the employee is injured because of the defectiveness, the company is responsible in damages.

"When defective cars belong to another company from which they have been received, the company receiving and using them will be held liable in damages if the injury be owing to their defectiveness.

"The employee will not be held guilty of contributory negligence when it was not shown that he was aware of the defectiveness and he had been ordinarily careful."

McFEE v. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

Supreme Court, Louisiana, June, 1890.

[Reported in 42 La. Ann. 790.]

FIREMAN KILLED IN RAILROAD WRECK — DUTY OF RAILROAD COMPANY TO PROVIDE SAFE ROAD-BED — PUNITIVE DAMAGES.—Railroad companies should provide safe road-beds, the cross-ties should be sound and the rails strong and securely laid.

An accident caused by*negligence in not thus providing for the safety of their passengers and employees will subject them to damages.

The question of punitive or exemplary damages need not be decided nor damages allowed, as there is not that element of malice or evil intent or oppression entering into and forming part of the act charged essential to decree such damages.

(Syllabus by the court.)

APPEAL from the Fifth District Court, Parish of Ouachita. The case is stated in the opinion. *Judgment amended and affirmed.*

POTTS & HUDSON and BOATNER & LAMKIN, for plaintiff (appellee).

SRUBBS & RUSSELL, for defendant (appellant).

Breaux, J.—This is a suit brought by plaintiff to recover of the defendant the sum of \$50,000 for the loss of her son, George McFee, who was killed while in the service of the defendant company as fireman on one of its engines, on the 9th of September, 1889, in a wreck of the railroad of the company.

The amount is alleged as due as follows: for damages in the physical and mental torture endured by him from the burns

and wounds which caused his death, and the apprehension of certain death which awaited him, the sum of \$15,000; for damages suffered in the loss of the society and support of her son the sum of \$15,000, and she, in addition, alleges that she has suffered exemplary damages in the sum of \$20,000, resulting from the wilful and criminal negligence of the defendant company in running its trains over an unsafe and dangerous track, the necessary repairs to which were delayed, although the dangerous condition and consequent peril to the safety and lives of its employees and the public were well known to the managers of the company.

It is also alleged that the disaster which resulted in the death of plaintiff's only son was caused by deficient and insecure rails and rotten cross-ties, which were totally unfit for the service required and the uses to which they were put. That the rails were greatly worn by age and use, and of a type and material long since out of use. That the cross-ties were worthless and unfit to bear the heavy weight of the ponderous engines and cars. That the condition of the track, rails and ties was well known to the defendant, which is guilty of gross and criminal negligence in failing to repair and put same in safe condition for traffic and travel. That a parsimonious policy was pursued; as a result the repair force was reduced to a number totally insufficient. * * *

The defendant company, on its part, denies any fault or negligence, alleges that the employees were competent, skilled and were supplied with necessary material to keep the track in good order, and if there was any defect it was latent. That if there was any responsibility it rested with the co-employees of the deceased. If there was any defect the deceased was aware of the condition of the track, having passed daily over it for months.

The jury found a verdict for the plaintiff for actual damages to the amount of \$7,500, and for punitive damages in the amount of \$5,000. * * *

The testimony is quite conflicting.

There are not many undisputed facts in the case. It is not contested that the deceased was the only son of the plaintiff, and that he was twenty-two years of age; that he had been an employee of the defendant as a fireman about one year.

These are about the only facts in regard to which there is

no disagreement. A number of witnesses were examined on the part of plaintiff.

Some of these witnesses were present when the accident occurred, others testify as to the condition of the road, examined at other times.

Several of the witnesses testify that deceased lived six or seven hours after his injuries, conscious most of the time, and suffering excruciating pain and intense agonies.

He died from the effect of the injuries received in the wreck at the time alleged. He was scalded to death.

With reference to the cause of the accident, the witnesses for the plaintiff do not disagree in anything material. They testify that the ties were not sound. The iron rails were not securely fastened to the ties. There were low joints connecting rails; high centers and no ballast. The ties were so broken and decayed that it was possible to break them with one's hand.

It is stated further that the average life of a steel rail is about two years, and of an oak tie in alluvial sections of country four or five years on a road on which there is ordinary wear by passenger and freight trains. That the rails and ties have not been renewed since a great many years. The road was not in perfect alignment in the mile sixteen, in which the accident occurred. It was not safe to run a train over mile sixteen at the rate of fifteen miles an hour. That the old-style iron rails used have been done away with long since. That the modern and safer appliances to secure the rails in position had not been procured. That the cars ran entirely out of line immediately in front and immediately in the rear of the place where the accident happened.

We do not think it necessary to further summarize the testimony of plaintiff's witnesses on this line. Suffice it to say that they agree in stating that the railroad was not at all in good condition. * * *

The witnesses for the defendant (employees of the company) do not entirely agree in their statements as to the condition of the road and as to the immediate cause of the accident. They state that the company furnished necessary materials to repair and maintain the road. That it was generally in a fair condition, safe for all trains. That the cross-ties were not so decayed as to make traveling on the road unsafe.

Some of the witnesses testify that there was a cross-tie

decayed—a mere shell—at the place of the derailment. A few of the witnesses testify that none of the ties were in such condition as to make it necessary to take them out, except at the place of the wreck. * * *

With reference to the direct or immediate cause of the accident there does not seem to be absolute certainty, or, at any rate, agreement in statement of a sufficient number of witnesses to make the cause evident—that is, as to whether it was owing to a defective joint fastening or cross-tie or rail. Some of plaintiff's witnesses, who testify on the subject, state that the derailment was caused by decayed ties giving way under the rails, throwing the engine off the track.

The supervisor of the road, testifying as a witness for the defendant, states that there was a decayed tie under the joint where the rails are connected and fastened; the rail had slipped a little. The flange of the wheel mounted the end of a rail and ran about twenty-four feet on its top before leaving it.

He testifies further: "Q. What was the condition of the tie upon which that chair was placed? A. The inside of the tie was rotten. The outside appeared to be sound, but was cracked right under the rail. I kicked it off where the engine mounted. It was perfectly rotten. The shell was thin, in some places a half inch, and in some places thicker, and appeared to be sound. To the eye it appeared to be sound until I kicked it off. Q. What was the cause of the bad connection there? A. It was caused by the spikes not holding. That shell was loose and would not hold the spikes. The spikes going into the rotten tie would not hold."

Other witnesses have testified to the same effect. * * *

The record discloses that the road was being repaired at the time of the accident. That the old was being replaced by new rails.

The train starter testifies that during the year ending October 1, 1889, more than 1,501 trains ran over mile sixteen. * * *

In answer to a motion to produce it, the defendant company brought into court the "Conductor's Accident Report." From it we extract the following: "Personal injury.—Name, George McFee; age, 25 years; occupation, fireman; residence, Monroe. Q. Married or single? A. Single. Q. Had he children? A. None. Q. Extent of injuries? A. Badly scalded, causing death. Q. Was injury caused by carelessness of the indi-

vidual? If so, in what respect? A. No. Q. Was injury caused by carelessness of any of the company? Was injury caused by any defect in roadway, track, bridges, machinery, rolling stock or equipment of any kind? If so, describe nature of said defect fully. A. Bad track, rotten cross-ties and chair off rail." [A chair is the fastening on either side of each end of the rail.]

An analysis of the testimony has resulted in convincing us that the answer in the "Conductor's Accident Report" is correct. He was in a position to know. His record was made at the time. It is corroborated as to its correctness by a decided preponderance of the testimony.

It devolves on railroad companies to maintain a safe road bed, undecayed cross-ties, and to see that the rails are properly adjusted and in proper position. * * *

The evidence further discloses that George McFee, the deceased, contributed something to the support of his family at different times. His mother, the plaintiff, is a widow, and has two daughters. The youngest is about sixteen years of age. At times, when in Monroe, the deceased resided at his mother's home. She has property of no great value, and is in debt. She owns her dwelling-house, and collects small rents. * * *

This case, in so far as relates to the condition of defendant's railroad, and the accident which caused the damages, is similar in many respects to the case of *Rutherford v. Shreveport & H. R. Co.*, 41 La. Ann. 793 (1). In that case it was held that there was negligence on the part of the defendant company, and damages were allowed for the injuries received, the sufferings and the loss.

The duty now devolves upon us of fixing the amount of damage. It is a responsibility we meet with concern and not without solicitude. If we were to consider only the excruciating pain, the agony suffered from the time of the injury

1. *RUTHERFORD v. SHREVEPORT & HOUSTON R. R. Co.*, 41 La. Ann. 793 (October, 1889), was an action by a passenger for injury caused by derailment of locomotive. The judgment for plaintiff for \$700 was reduced to \$200, and, as thus amended was affirmed. On the question of damages it was held that:

"The measure of such damages is the injuries received, the suffering experienced, and the consequent losses sustained by the injured passenger.

"In Louisiana, the doctrine of exemplary or punitive damages, as applicable to common carriers, is not yet definitely sanctioned."

until the death, the mental distress of the deceased while struggling with death, the great suffering of the mother in parting from her only son, the affliction, the sad event memory unwillingly and mournfully recalls, and attribute these to wilful and outrageous negligence, the amount of our decree would be a very large amount.

While there must be compensatory damages allowed, it must not be forgotten that defendant's employees, although negligent, never for an instant realized the possibility of an accident to one against whom they did not bear the least ill-will.

There was too much delay in making repairs, an excess of economy, error of judgment; but these are no acts of malicious or outrageous negligence.

From the case of *Peyton v. Texas & P. R. Co.*, 41 La. Ann. 861 (1), we quote: "A review of our reports in similar cases points to only two occasions on which this court has allowed damages in excess of \$10,000 for personal injuries. Among the cases we find an allowance of \$7,000 for an accident whereby the head of a large family lost his life—their only support; and the allowance of \$5,000 in another, and \$3,000 in another case. We find that the courts of other States have allowed less."

1. *PEYTON v. TEXAS & PACIFIC RY CO.*, 41 La. Ann. 861 (October, 1889), was an action for damages for injuries inflicted on a person not an employee of defendant by alleged carelessness of defendant's employees in running a locomotive whereby he was struck by the pilot beam of the same, after he had succeeded in pushing a friend off the track to save him from being struck by the train. Plaintiff recovered a verdict and judgment for \$25,000, from which defendant appealed. It was held that the damages were excessive, and the judgment was reduced to \$5,000 and, as amended, *affirmed*. The points are stated in the syllabus by the court as follows:

"It is negligence on the part of a railroad company, in running accommodation trains through a city to a

fair ground in the suburbs, where large numbers of people congregate around the station, to use an inferior locomotive, run by a fireman instead of a skilled engineer, and to run its trains at a dangerous speed in approaching the station.

"It is not contributory negligence in a person to risk his life or place himself in a position of great danger, in an effort to save the life of another or to rescue another from a sudden peril or great bodily harm.

"The allowance of excessive damages by juries for personal injuries must be discountenanced."

See, also, *De Mahy v. Morgan's Louisiana & Texas R. R. Co.*, 45 La. Ann. 1329, 9 Am. Neg. Cas. 398, where a mother was injured in an attempt to save her child from danger.

In the case of *Poirier v. Carroll*, 35 La. Ann. 708 (1), the court held: "The verdict of the jury was for \$12,000. We think it is excessive, and should be reduced. The suit is not nor could it be brought for damages sustained in consequence of the death of Poirier, but for the suffering and pain which he endured from the time of the explosion to that of his death — a period of some eighteen hours; during part of which he was apparently insensible or unconscious. Whatever the endurance was, his widow and minors can not secure heavier damages than he would have been entitled to demand and receive had he survived. * * *

In the case of *Vredenburg v. Behan*, 33 La. Ann. 627, 1 Am. Neg. Cas. 349, in which the unfortunate victim had been sprung upon by a ferocious bear which lacerated his flesh, and he suffered tortures ending after twenty-eight days, the jury had allowed \$15,000. Their verdict was reduced to \$7,500. We do not think that, under the circumstances of the case, the suffering not having been longer than twenty-four hours, the plaintiff should recover more than \$2,500." * * *

Having considered the jurisprudence on the subject fixing the amount in similar cases at considerably less than we allow in our decree, and giving due weight to the verdict of the jury, to which we attach importance, although we can not agree with its finding, we fix the compensatory damages at \$6,000. The object is not benefit. We think this amount secures justice. We will not particularize the damages, and we will not dissect

1. In *POIRIER v. CARROLL*, 35 La. Ann. 699 (May, 1883), action by a widow and tutrix for damages claimed to have been occasioned to a husband and father by the incompetence and negligence of a fellow-servant in defendant's employ, the injuries resulting in death, judgment for plaintiff for \$12,000 was amended, by making it \$2,500, and, as amended, was affirmed. Poirier was a skilled engineer employed on defendant's sugar plantation, and was fatally injured by an explosion of the boilers, due to negligence of the engineer's assistant. Among the rulings in the case were the following:

"A master is responsible to his em-

ployee for damages caused to him by an incompetent fellow-servant.

"Notice to the employer of such incompetence, and promise on his part to remove the incompetent fellow-servant, are not indispensable on the part of the injured employee, whose services are hired for a limited time, and who has a right to perform his contract and require his pay.

"The responsibility attaches, undoubtedly, when there is shown a formal notice and an express promise to change, and when a failure to remove and consequent injury resulting therefrom are established. The promise need not be explicit."

the purest sentiments and the kindest impulses to establish how much is allowed for each separate item of suffering.

The facts have been carefully examined; our conclusions have been reached, and the amount fixed after close study, deliberation and consultation.

The reasoning which led to the conclusion just expressed precludes the possibility of condemning the defendant to pay exemplary damages. If such damages are allowable as such, at all, under our system, they are allowable only when an element of malice or evil intent or oppression enters into and forms part of the act. This, the line of reasoning followed by us, has already negatived.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be amended by deducting therefrom the sum of \$5,000 allowed for punitive or exemplary damages; that the amount allowed for actual or compensatory damages be reduced from \$7,500 to \$6,000, and that as thus amended the judgment is affirmed with interest at legal rates from judicial demand, in the amount allowed, defendant and appellant to pay the costs of the lower court, plaintiff and appellee the costs of appeal.

McENERY, J.—I concur in the principles announced in the decree in this case, but reluctantly differ in opinion from the majority of the court in the estimation of actual or compensatory damages. I am of the opinion that in this respect the judgment appealed from should be affirmed. *Curley v. Ill. Cent. R. R. Co.*, 40 La. Ann. 810 (1).

FLAGMAN RUN OVER AND KILLED BY TRAIN — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE. — In **DANDIE v. SOUTHERN PACIFIC R. R. CO.**, 42 La. Ann. 686 (*May Term, 1890*), action by plaintiff to recover damages for the loss of the life of her son, a flagman in defendant's employ, judgment for plaintiff in the Civil District Court for the parish of Orleans for \$5,000 was *reversed*, on the ground of assumption of risk and the contributory negligence of deceased. In the opinion rendered by **McENERY, J.**, it is said:

"The facts are that the plaintiff's son was at the time of his death in the service of defendant company as flagman. His duties were of such a character as are required on all railroads. The engine

1. *CURLEY v. ILL. CENT. R. CO.*, 40 a collision between a "float" and a La. Ann. 810 (1888), was an action arising out of an injury sustained by

which ran over the deceased was used for the purpose of taking cars from the ferry-boat at the Morgan landing and moving them backward and forward, forming them into a train, or placing them into position to be loaded. The flagman rode on the car when backing and when going forward in front of the engine on a footboard placed there for that purpose. When the train approached a crossing it was the duty of the deceased to jump down, go to the crossing and protect it with a red flag. When a switch was approached which needed attention, he jumped down, ran to it, and turned it. When the engine came near him he jumped on it, ready again to perform the same duties. Dandie, the flagman, had been engaged in this work in the service of the defendant for some nine months. He was familiar with his duties, and had been instructed to get off the engine on the side of the track, either the right or the left, as occasion required. This was the safest manner for him to perform his duties. By standing near the end of the footboard the flagman can be seen by the engineer, if he is on the right, and by the fireman, if he is on the left. If he stands in the center he can be seen by neither. If the engineer is going too fast for the flagman to jump, it is his duty to signal the engineer, if he is on the right of the footboard; and if on the left, the fireman, who immediately communicates with the engineer. This signal is made with the flag, hat, or hand. It is immediately obeyed, and the speed is slackened so that the flagman can jump with safety. If it is not slackened, he is not compelled to jump, but it is his duty to stand on the footboard. There were no obstacles to prevent the deceased from jumping to the side of the track, which was in a condition that he could do so with comparative safety. The footboard for the flagman extends all the way across the front of the engine in order that he may pass from one side to the other to alight on either side of the track, according to the position of the switch or crossing.

"There is a wide difference of opinion as to what rate of speed the engine was going. Some of plaintiff's witnesses put it at a high rate, while defendant's witnesses fix the rate at not more than six miles per hour. On the day of the accident George Dandie was standing near the center of the footboard where the engineer and the fireman could not see him. When about fifty feet from the switch, which he had to turn, Dandie jumped in front of the engine between the rails and was overtaken and run over by it." * * *

The court held that deceased assumed the risks of the employment, and ruled (as per official syllabus) as follows:

"1. The servant assumes the ordinary risks and dangers of his employment, and cannot hold the master responsible for an injury sustained in consequence of one of the risks incident to said employment.

"2. The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which necessarily exposes him to danger, he is responsible for the selection.

"3. When the master does not increase the risk assumed by the servant, and there are no defects in any of the appliances provided by the master for the performance of the duties required of the servant, the servant cannot hold the master responsible for injury received in the course of his employment.

"Where the evidence shows contributory negligence on the part of the injured party, he cannot recover damages for the injury."

NOTES OF LOUISIANA MASTER AND SERVANT CASES.

Brakeman coupling cars fatally injured in collision.

In *TOWNS AND WIFE v. VICKSBURG, SHREVEPORT & PACIFIC R. R. Co.* (June, 1885), 37 La. Ann. 630, action by a father and mother for damages for a fatal injury to their son, James Towns, a brakeman in defendant's employ, while coupling cars, caused by collision of cars of unequal height, the railroad company was held liable, but the verdict and judgment for plaintiffs was reduced to \$1,000 and, as amended, was *affirmed*.

Brakeman injured coupling cars — Fellow-servants — Act of third person — Assumption of risk.

In *WALLIS v. MORGAN'S LOUISIANA & TEXAS R. R. & STEAMSHIP Co.*, 38 La. Ann. 156 (March, 1886), brakeman injured while coupling cars, judgment for plaintiff for \$12,500 was *reversed* and annulled, on the grounds that plaintiff assumed the risk, that the engineer and brakeman were fellow-servants, and that the evidence showed that the injury was caused by the mischievous act of an unknown third person for which defendant was not responsible.

Brakeman coupling cars run over by train — Contributory negligence.

In *RYAN v. LOUISVILLE, NEW ORLEANS & TEXAS R'y Co.*, 44 La. Ann. 806 (May, 1892), brakeman coupling cars on freight train knocked down and run over by train and fatally injured, judgment for plaintiff was *reversed* and annulled, and judgment ordered for defendant, on the ground that the deceased was guilty of contributory negligence.

Engineer fatally injured in explosion of boiler — Fellow-servant — Contributory negligence — Railroad not liable.

In *HUBGH v. NEW ORLEANS & CARROLLTON R. R. Co.*, 6 La. Ann. 494 (May, 1851), where plaintiff's husband, a locomotive engineer in defendant's employ, was injured by the explosion of the engine boilers, judgment for plaintiff for \$5,000 was *reversed*. It was held that:

"An action for damages caused by the homicide of a free human being cannot be maintained.

"A master is not liable to a servant for damages resulting from the negligence of another servant, unless that other servant was habitually careless or unskilful.

"If the boiler of an engine of a railroad car has an apparent defect, and the engineer continues running it with a head of steam higher than he was instructed to carry, he could not recover damages for any injury he might sustain from the explosion of the boiler, nor can his widow or his heirs recover damages for his death under such circumstances."

Engineer fatally injured—Break down of railroad bridge.

In *VAN AMBURG v. VICKSBURG, SHREVEPORT & PACIFIC R. R. Co.*, 37 La. Ann. 650 (June, 1885), action by plaintiff for damages sustained by the death of her son, a locomotive engineer in defendant's employ, caused by the breaking of a bridge on defendant's line of railway, the railroad company was held liable, but verdict and judgment for plaintiff for \$5,000 was reduced to \$1,000, and, as amended, was *affirmed*.

Conductor killed in derailment of engine—Collision with car on trestle—Knowledge of danger—Assumption of risk.

In *TILLOTSON v. TEXAS & PACIFIC R. R. Co.*, 44 La. Ann. 95 (January, 1892), action by the widow of Thomas Crilly, who was a conductor in defendant's employ, for damages for the death of said Crilly who was killed by the overturning of the locomotive through collision with a cow while the train was running over a trestle over a small canal which was unenclosed, judgment for defendant was *affirmed*, the deceased, with knowledge of the danger, having assumed the risks.

Yard switchman injured—Defective appliance—Fellow-servant.

In *SATTERLY v. MORGAN*, 35 La. Ann. 1166 (December, 1883), it was held that "in absence of proof of fault or negligence in the employment of incompetent or careless servants, an employer is not responsible for damages resulting to one servant from the fault or negligence of another." Plaintiff was a yard switchman on defendant's railroad, running into the yard empty cars and sending out loaded ones. He was knocked under the cars, being struck by a rope which was used in his work. Judgment for plaintiff for \$1,500 was *reversed and annulled*, it being held that plaintiff's claim was not sustained.

Personal injuries caused by electricity—Stringing telegraph wires.

In *CLAIRAIN (individually and as tutrix) v. WESTERN UNION TELEGRAPH Co.*, 40 La. Ann. 178 (February, 1888), an action by a widow in her own right, and as natural tutrix of her minor children, to recover damages for the death of her husband, an employee of defendant, who, while putting up telegraph wires on a city street fell from a pole and sustained fatal injuries, judgment for plaintiff for \$3,000 was *affirmed*. It was held that the claim of the widow and children for damages was properly presented in one suit. [Followed in *Curley v. Ill. Cent. R. Co.*, 40 La. Ann. 810.] An employer must furnish his servants safe means and appliances for work, and failure in this respect renders him liable for injury to servant occasioned thereby.

Minor employee killed in dynamo room—Contact with electric wire.

In *MYHAN AND WIFE v. THE LOUISIANA ELECTRIC LIGHT & POWER Co.*, 41 La. Ann. 964 (December, 1889), where plaintiff's son, aged eighteen years,

was killed while attending to the dynamo box in defendant's arc light department, his legs coming in contact with a wire and he received the full force of the electric current, judgment for defendant was *reversed* and *annulled*, and judgment ordered for plaintiffs for \$2,000. The syllabus by the court states the points as follows:

"A master who carries on an imminently dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as to be clearly understood by him.

"Absence of *actual* knowledge is no exculpation. Constructive or obligatory knowledge supplies it. Such knowledge is presumed *juris et de jure* to exist.

"The servant is not required to know *latent*, but only *patent* defects. Actual knowledge must be established by the master, on whom rests the burden of proof.

"The servant has a right to assume superior knowledge in his employer, to rely on his prudence and judgment, and to believe that he will not unnecessarily jeopard his person and life by avoidable risk."

Lineman killed by electricity — Live wires — Assumption of risk.

In *SMART v. LOUISIANA ELECTRIC LIGHT CO.*, 47 La. Ann. 869 (April, 1895), action by plaintiff, personally, and as tutrix of her minor children, for damages for death of her husband, a lineman in defendant's employ, who was killed by electricity while attending to live wires, defective gloves being alleged, judgment for defendant was *affirmed*, on the ground that deceased assumed the risks. Rehearing refused.

Electric light lamps inspector killed by electricity — Contributory negligence.

In *DIXON v. LOUISIANA ELECTRIC LIGHT AND POWER CO.*, 47 La. Ann. 1147 (March, 1895), action by father for damages for death of his son, a night inspector of lamps in defendant's employ, the deceased being nearly under a lamp which he was repairing instead of on the insulating board, and his body being found in an opposite direction, the lamp being between the body and the insulating board, judgment for defendant was *affirmed*, the deceased having failed to observe ordinary care. Rehearing refused.

Lineman fatally injured by fall of electric pole.

In *BLAND AND WIFE v. SHREVEPORT BELT R'Y CO.*, 48 La. Ann. 1057 (June, 1896), action by plaintiffs for the death of their son, an electrician and lineman in defendant's employ, judgment for plaintiffs for \$2,500 was reduced to \$1,800, and, as amended, was *affirmed*. "The lineman of the defendant company in the discharge of his duty was ordered to take down a guy wire from an electric pole and guy tree. The pole had not been securely planted. It fell on the lineman, inflicting injuries of which he died. The vice of construction was latent and concealed. The officers of a preceding board of management had been notified of the defect. The company is not relieved under the plea of want of notice, although the present general manager had not been notified, but the preceding manager or superintendent. The lineman did not voluntarily place himself in a dangerous position. The employee is not bound to know *latent*, but only *patent* defects. The master must provide suitable appliances."

Explosion of boiler in ice-house.

IN *MATTISE v. CONSUMERS' ICE MANUFACTURING CO.*, 46 La. Ann. 1535 (December, 1894), action by a father for damages for death of his son caused by the explosion of a boiler owned by defendant, the deceased being under the immediate direction of defendant's chief engineer, judgment for plaintiff for \$2,500 was reduced to \$1,000 and, as amended, was *affirmed*. Rehearing refused.

Employee falling into drain filled with scalding water.

IN *POWERS v. THE CALCASIEU SUGAR COMPANY*, 48 La. Ann. 483 (February, 1896), where plaintiff, a cooper in defendant's employ, was injured by falling into a drain on defendant's premises partially filled with scalding water, judgment for plaintiff for \$3,000 was reduced to \$2,000, and, as amended, was *affirmed*.

Employee injured by fall of iron in excavation.

IN *MCCARTHY v. THE WHITNEY IRON WORKS COMPANY*, 48 La. Ann. 978 (June, 1896), where plaintiff, a laborer in defendant's employ, while engaged in digging a pit to be used for molding castings, was struck by the fall of a heavy piece of iron which had been the overflow of some previous casting, judgment of the lower court setting aside the verdict of the jury for plaintiff was *affirmed*, the plaintiff having failed to exercise ordinary care.

Employee attending to machinery injured by an appliance — Assumption of risk.

IN *SAUER v. UNION OIL CO.*, 43 La. Ann. 699 (May, 1891), where plaintiff was ordered by defendant's foreman to assist another employe in placing a belt on the meal crusher in its factory, and while so engaged was struck on the head by a painful blow from an alleged defective appliance which broke loose from its fastenings, judgment for plaintiff was *reversed* and *annulled*, and judgment ordered for defendant. It was held that plaintiff having selected a dangerous route to attend to certain work ordered by foreman, without being directed which way to go, and without making inquiry, assumed the risks and could not recover for the injury sustained.

Employee of stevedore injured while loading vessel — Ship owner not liable.

IN *SWEENEY v. MURPHY ET AL.*, 32 La. Ann. 628 (May, 1880), where a bale of cotton fell upon a laborer engaged in loading a vessel, it was held that the master and owners of a ship, having contracted with a competent stevedore to load her, and not having controlled or directed, in any manner, the laborers employed in the loading, are not responsible for injuries resulting from the negligence of said laborers. Judgment for plaintiff *reversed*.

IN *REILLY v. STATE LINE STEAMSHIP CO.*, 29 La. Ann. 791, it was shown that the same stevedore (Joseph Cooper) was employed as in the case of *Sweeney v. Murphy*, 32 La. Ann. 628. The ship furnished the apparatus used by the stevedore. The machinery broke and killed a screwman and the widow brought suit against the company. *Held*, that the company was not liable.

Master not liable for act not within servant's scope of employment.

IN *DYER v. RIELEY AND LEATHERS ET AL.*, 28 La. Ann. 6 (January, 1876), where plaintiff, a roustabout on one of defendants' steamboats was struck in

the eye by a pine knot thrown at him by Rieley, the mate of the vessel, judgment against all the defendants for \$5,000 damages was *reversed*, it being held that the owners were not responsible for the act of the mate, as the act was not done within the scope of the latter's employment.

BEAULIEU v. PORTLAND COMPANY.

Supreme Judicial Court, Maine, 1860.

[Reported in 48 Maine, 291.]

INJURY TO EMPLOYEE—BURDEN OF PROOF.—In an action brought by an employee of a corporation to recover damages for a personal injury received while in their service, the burden of proof is on the plaintiff to show negligence on the part of the corporation.

SAFE MACHINERY AND APPLIANCES.—If a company exercises ordinary care to employ servants of good habits, and of competent skill and experience, and to furnish them with approved machinery and apparatus, their responsibility to their employees extends no further. They do not guaranty the faithfulness of their servants, whatever relation or subordination they sustain, in carrying on the business, or keeping the works in such repair as to be always safe.

PRACTICE—OBJECTION—NEW TRIAL.—It is not a sufficient objection to the action of the court in ordering a nonsuit, that there was some evidence from which negligence on the part of the defendants might have been inferred, unless there was evidence on which a jury might reasonably and properly conclude there was negligence.

(Official syllabus.)

THIS was an action of trespass on the case, brought by the plaintiff to recover damages for a personal injury, which happened to him by the falling of a stick of timber whilst he was in the service of the defendants. The defendants pleaded the general issue, with a brief statement alleging that the timber, which caused the damage by its fall, was not placed by the defendants or by their negligence, but by certain of their employees, who were persons of ordinary skill and care, etc. (Western District, Cumberland.)

It appeared by the testimony of the plaintiff, that he was in the employment of the Portland Company in 1853 and 1854, and again in 1855, and so on till 1857. The company was engaged in manufacturing locomotives. The plaintiff worked in the setting-up shop from May 19, 1855, to August 26, 1857. There were several loose timbers laid across beams, and shifted from place to place as needed for hoisting. The plaintiff noticed three of them loose in 1853, and one of them lapped on

the beams on which it rested about an inch and a quarter or an inch and a half at each end. He notified the foreman, Bartlett, of its dangerous condition, three or four times. Bartlett called him a coward, and ordered him to go to work. Sparrow, the superintendent, was in the room about twice a day. On the same day he last called Bartlett's attention to the timbers, one of them fell and struck the plaintiff. He was hurt, and was confined to his bed about three months. The locomotive on which he was at work at the time was placed on a table, and the work he had to do required him to occupy the position he did.

Other witnesses were called, who testified that the timber in question had been lying loose on the beams for a long time, and had been used with others for hoisting; that it fell on the plaintiff longitudinally, and he was taken up unconscious and partially paralyzed; and that, immediately after the accident, the loose timbers were taken down, by order of the foreman, and, ever since, longer and lighter timbers had been used.

On this testimony, the presiding judge, Davis, J., ordered a nonsuit. The plaintiff filed exceptions. *Exceptions overruled.* MCCOBB & KINGSBURY, for plaintiff.

EDWARD FOX and E. H. DAVIES, for defendants.

Davis, J.—The plaintiff was one of the employees of the defendants, engaged in the manufacture of locomotives. While thus at work, in what is termed "the setting-up shop," a stick of timber fell upon him, from the beams overhead, by which he was severely injured. To recover damages therefor he has brought this suit.

It appears, from his own testimony, that he had been at work for the company several years, during which time there had been some loose timbers lying across the beams, which were used for hoisting, and were shifted about as occasion required. The one that fell down, lapped on the beam less than two inches at either end. The plaintiff noticed that it was dangerous six months before the accident, and called the attention of Bartlett, the foreman of the shop, to the fact. He also called his attention to it again about the time of the accident; but Bartlett called him a coward, and told him to go to work.

It appears that Sparrow, the general superintendent of the business of the company, was usually in the shop every day; but there is no evidence that he knew anything of the position of these timbers.

The plaintiff was employed by the day, and he could have left the service of the defendants at any time. But he was desirous to retain his place; and it is not strange that he continued to labor for them, even after he was aware of the danger, when he saw that his fellow-laborers had no fear. Whether, by so doing, he did not voluntarily assume the risk, even if the defendants were negligent, is not the question now before us.

Upon the evidence introduced by the plaintiff, the presiding judge ordered a nonsuit, and the case comes before us on exceptions to that order. It has been argued with much learning and ability; but it is hardly necessary for us to enter upon any extended review of the numerous authorities cited. Whatever doubts may formerly have been entertained, the doctrine is now well settled, in this country and in England, that if a company exercise ordinary care to employ servants of good habits, and of competent skill and experience in their various departments, and to furnish them with machinery and apparatus of approved construction and material, their responsibility extends no further. They do not guaranty to their employees the faithfulness and diligence of their co-laborers in carrying on the business, or in keeping the machinery in such repair, or the works in such condition, that they shall be always safe. This is a part of the hazard which the employees impliedly assume themselves, whenever they enter into service with each other. *Carle v. B. & P. R. R. Co.*, 43 Me. 269, and cases there cited (1).

And this rule applies to all who are engaged in the common business, whatever relation of subordination they sustain to each other. *Hard v. Vermont & Canada R'y Co.* (32 Vt. 473), *Law Reporter* for January, 1860, p. 540.

It is argued in this case, that the nonsuit was improperly ordered, because the jury might have inferred from the testimony that there was negligence on the part of the corporation, as well as of its servants. The rule by which courts should be guided in ordering nonsuits is correctly stated in a recent English case, in the Court of Exchequer: "It is not enough to say there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must be evidence on which the jury might reasonably and properly conclude that there was negli-

1. The *CARLE* case is reported with the Maine cases on page 305, *post*.

gence." *Cornman v. Eastern Counties R'y Co.* (1), *Am. Law Register*, January, 1860, p. 176 (4 H. & N. 781).

In the case at bar, the burden of proof was upon the plaintiff to show the negligence of the defendants. And, assuming that there was evidence that some of the fellow-servants of the plaintiff were negligent, upon which it is not necessary for us to express any opinion, there is no evidence that would have justified the jury in finding, that, in employing their servants, or in furnishing machinery and apparatus, there was such negligence on the part of the *company* as to render them liable in this action.

The exceptions are overruled, and the nonsuit is confirmed. TENNEY, CH. J., APPLETON, CUTTING, GOODENOW and KENT, JJ., concurred.

BUZZELL v. LACONIA MANUFACTURING CO.

Supreme Judicial Court, Maine, 1861.

[Reported in 48 Me. 113.]

DUTY OF MASTER TO FURNISH SAFE MACHINERY AND APPLIANCES.—It is the duty of every employer to use all reasonable precautions for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and, by the same reasoning, bridges, passageways or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer.

LIABILITY FOR DEFECT NOT KNOWN TO SERVANT.—The master is responsible to the servant for an injury caused by the negligence and want of ordinary care of the former, the defect occasioning the injury being known to the master, and not to the servant.

ASSUMPTION OF RISK.—But, if the defect was known to the servant, or to both servant and master, and the servant continued in the service, he assumed the risk himself.

CONTRIBUTORY NEGLIGENCE.—Neither can the servant recover, if his own neglect contributed to the injury. In order to maintain his suit, he must show ordinary care on his part.

1. In *Cornman v. Eastern Counties R'y Co.*, 4 H. & N. 781, it appeared that a party being at a railway station in the daylight, with a crowd of persons, awaiting the arrival of a train, caught his foot against the edge of a weighing machine, the base of which was raised a few inches above the level of the platform, and falling,

broke his kneecap. The machine was of a description in use at railway stations, and was in its usual place, adjoining the end of a counter on which passengers' luggage was placed on the arrival of trains, and was used for weighing luggage. Held, that there was no evidence of negligence.

DEFECTIVE PASSAGEWAY IN MILL—NOTICE—PLEADING—

DECLARATION.—In a suit for damages to an employee, arising from the neglect of the employer, in the use of defective machinery or tools, the declaration is bad, if it does not allege, that the defect was unknown to the plaintiff, as well as known to the defendant, and that it arose from the want of proper care and diligence on the part of the defendant.

(*Official syllabus.*)

ON DEMURRER. (Western District, York.)

This was an action of the case. The declaration alleged, in substance, that the defendants were the owners of a cotton mill in Biddeford, to which they had built and maintained a bridge and walk for persons working in the mill to pass and repass over when going to and returning from said mill; that on the 24th day of September, 1859, the plaintiff was, and for a long time had been, in the defendants' employment, and, in such employment, was required to pass over said bridge and walk; that the defendants then, and for a long time before, had represented that said bridge and walk were safe and sufficient; that the said bridge and walk were not safe and sufficient, but, on the contrary, unsafe, etc.; and that, on said day, by reason of the negligence and carelessness of the defendants, and not by any fault of her own, the plaintiff was thrown down and permanently lamed and injured, etc., to the damage of the plaintiff in the sum of \$10,000. A second count alleged that, by reason of the injury received by the plaintiff, she had suffered great pain and inconvenience, had expended large sums of money for surgical aid, nursing, etc. The defendants filed a general demurrer, which having been joined, the presiding judge, Appleton, J., adjudged the declaration bad. The plaintiff excepted. *Exceptions overruled.*

R. P. TAPLEY, for plaintiff.

T. M. HAYES, for defendants.

Appleton, J.—The plaintiff and the defendants sustain to each other the relation of master and servant. The plaintiff, in her writ, alleges that the defendants are owners of a mill and bridge erected by them and connected therewith, over which she was obliged daily to pass and repass in going to and returning from her labor in their service; that through their negligence it had become out of repair, unsafe and dangerous; that the defendants represented it to be safe and free from danger; that, relying on their representations, she passed over the bridge, and, in so passing, was dangerously injured

and suffered great bodily pain, without fault on her part, and in consequence of the defective and dangerous condition of the bridge, arising from the defendants' neglect and want of ordinary care.

The defendants, by their demurrer, admit the facts set forth in the plaintiff's writ.

The defendants would, unquestionably, be liable to a stranger for an injury caused by the defect or want of repair of a bridge which they were bound to keep in repair, and over which he was obliged to pass and was passing to the defendants' counting-room, for the purpose of transacting business with them, if the injury occurred without default on his part, and in consequence of the ruinous condition of the bridge, arising from their negligence and want of ordinary care.

It is difficult to perceive why a similar rule should not apply in case of a servant injured in passing over a bridge unsafe from the negligence of his employer, when he is passing over the same in the course of his employment, and the neglect of the employer, without fault on his part, is the cause of the injury.

It is the duty of every employer to use all reasonable precautions for the safety of those in his service. He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect. The capital of the master furnishes the means of his employment. His will determines the place. His sagacity directs, controls and supervises not merely the labor, but the machinery and other instruments and appliances by which the labor is performed. The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril. The servant has no general control. He is the actor. The master is the director. The one commands, the other obeys. The servant is in subordination. He relies on the judgment of the master that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe, and he may be wanting in the intelli-

gence required for the proper determination of the question. His service is compulsory, from the pressure of want. His attention is exclusively due to the peculiar duties incident to his branch of employment. He assumes the risks, more or less hazardous, of the service in which he is engaged, but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation and preventable by ordinary care and precaution on the part of his employer.

The servant is responsible for his own neglects. The general supervisory responsibility and control over all the work to be done, the place where, the instruments with which and the persons by whom it is to be done, rest with the master.

The same reasoning, which shows that the machinery and other instruments of labor should be safe, would demand that the bridges used in passing from one part of the premises to another, or the ladders used in ascending to or descending from labor, and that the passageways in the premises of the employer and within the precincts of the place where the labor is to be done, should be safe and convenient; and that at least, the same care and precaution be used for the safety of the servant as for that of the stranger whose accidental presence, business may require within the same limits.

The claim, as stated in the plaintiff's declaration, arises from the relation of master and servant, and from the neglect of the master in that relation. It is so argued by the counsel for the plaintiff. It is so resisted by the counsel of the defendants. It will be so examined and determined by the court.

The rule is well settled, that a master is not liable to a servant for an injury caused by the neglect of a fellow-servant in the same employ. Each servant assumes the risk of neglect on the part of fellow-laborers.

The question here presented is, whether the master is liable to a servant for an injury caused by his own negligence and want of ordinary care.

By recurrence to the decisions of courts it will be perceived that the weight of judicial authority is in favor of the maintenance of an action like the present. In *Williams v. Clough*, 3 Hurl. & Nor. 259, it was alleged in the declaration that the defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that

the plaintiff was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into his granary; that the defendant, believing the ladder to be fit for use and not knowing the contrary, did carry corn up the ladder to the granary, and, by reason of the ladder being unsafe, the plaintiff fell from it and was injured. It was held, on demurrer, that the declaration was sufficient. In *Roberts v. Smith*, 2 Hurl. & Nor. 213, the injury arose from a rotten and defective scaffold, over which the plaintiff, a bricklayer, was compelled to pass in the course of his employment, and, in consequence of its rottenness, it broke, and the plaintiff fell to the ground. The case assumes the liability of the defendant, if the injury arose from his negligence, he knowing the condition of the scaffold and the servant being ignorant thereof. In *Vose v. Lancashire & Yorkshire R. Co.*, 2 Hurl. & Nor. 728, the cause of action arose from the defective rules of the defendant corporation, and their observance, and the defendants were held liable. In *Patterson v. Wallace*, 1 McQueen (Scot.), 748, "I believe, by the law of England," says Lord Cranworth, "just as by the law of Scotland, in the actual state of the case with which we have to deal here, a master employing servants upon any work, particularly a dangerous work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle and being guilty of negligence, his negligence occasioning loss to them." The same view of the law was taken by Lord Brougham in that case. The case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1, was an appeal heard in the House of Lords, from a judgment of the Court of Session in Scotland, in an action by the representatives of a miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant, his employer. The law of Scotland was, throughout the case, treated as the same with the law of England. The servant, in that case, was killed while leaving his master's employment, without proper cause. "A master," says Lord Cranworth, "by the law of England and by the law of Scotland, is liable for accidents, occasioned by his neglect, to those whom he employs. I quite adopt the argument of the solicitor-general, that he is duly responsible while the servant is engaged in his employment, but then we must take a great

latitude in the construction of what is being engaged in his employment;" and he further adds, that the liability of the master continues "whatever he does in the course of his employment, according to the fair interpretation of the words, *cundo, morando, redeundo*, for all that the master is responsible, and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord Brougham, in the same case, "who let them down, is bound to bring them up, even if they come up on their own business and not on his; he is answerable for the state of his tackle by which this lamentable accident was occasioned." In *Bryden v. Stewart*, 2 McQueen (Scot.), 30, the lord chancellor, *inter alia*, said, "the law of both countries (England and Scotland) make a master liable for accidents occasioned by his neglect towards his servants."

In *Dixon v. Rankin*, 14 Court of Session Cas. 420, the lord justice clerk held, "The master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus and keeping the same in good condition, and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater obligation to make up for its defects by the attention necessary to prevent such an injury."

The English cases, cited by the counsel for the defendant, are not adverse to these views. In *Tarrant v. Webb*, 86 E. C. L. 796, Jarvis, Ch. J., says, "The rule is now well established, that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. That, however, does not negative liability in every case. The master may be responsible when he is personally guilty of negligence," etc. In *Ormond v. Holland*, 96 E. C. L. 102, the liability of the master to the servant for personal neglect, is fully affirmed. "The rule is," remarks Crompton, J., "that the master is not liable, unless there be personal negligence on his part, which negligence may be either personally interfering in the work or in selecting servants, who do interfere" (1).

The same question has been repeatedly discussed in the courts of this country, and with the same result as in England.

1. The English cases cited in the opinion in the case at bar are sufficiently stated, rendering repetition of the rulings therein unnecessary as a note thereto.

In Indianapolis R. R. Co. *v.* Love, 10 Ind. 554, 14 Am. Neg. Cas. 518*n*, the court held the corporation liable if they allow an employee to pass over a *defective bridge*, known to the corporation, and not to the servant. If the employee knows, or both company and employee know, the company is not liable, unless it give special directions. But, in the present case, it is not necessary to consider the effect of special directions, and as to that, we give no opinion. In Keegan *v.* Western R. R. Co., 4 Seld. 175, a railroad company which continued a defective and dangerous locomotive, was held liable to its servant engaged in running such machine, for an injury sustained by him (without negligence on his part), in consequence of such defects. In Noyes *v.* Smith, 28 Vt. 59, it was decided, that a master was bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servants; and if he fail to do so, he will be liable to the servant for any injuries he may sustain therefrom. In Mad River & Erie R. R. Co. *v.* Barber, 5 Ohio, N. S., 541, the court say, "if the defects which caused the injury were actually unknown to the company or the conductor, and were not discoverable by due and ordinary care and inspection, and yet, were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring or continuing to use cars and machinery beyond the time when they could be safely used, the company will be liable." In McGatrick *v.* Wason, 4 Ohio, N. S., 566, the general rule is declared to be that an employer, who provides overseers and controls the operation of machinery, must see that it is suitable, and if a defect, unknown to a workman, injures him, which ordinary care could have prevented, the employer is liable for the injury. In Byron *v.* N. Y. Telegraph Co., 26 Barb. 39, the plaintiff was employed to climb the poles and regulate the wires. The complaint alleged negligence in providing and using unsound poles and in not having guards, etc. The company was held liable. Negligence was proved by showing the corporation knew the defect in the pole. The defect, in that case, was not known to the plaintiff and was not discoverable by inspection. In Hayden *v.* Smithville M'f'g Co., 29 Conn. 548, 13 Am. Neg. Cas. 669, it was held, that a servant might maintain an action against his master for an injury caused by defective machinery, when the employer knew, or ought to have known, of the defect, and the servant did not

know it and had not equal means of knowledge. In *Fifield v. Northern R. R.*, 42 N. H. 225, the plaintiff, a brakeman in the employ of the defendant corporation, being injured, without fault on his part, by their negligence in permitting the road to be blocked up with snow and ice, and their car to be out of repair, was held entitled to maintain an action to recover compensation for the damages by him so sustained.

If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk and can not recover. He might leave if he chose, but, choosing to remain, he cannot remain at the risk of the master. Every employer has a right to judge for himself how he will carry on his business, and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service, or, having entered, whether they will remain. *Hayden v. Smithville M'fg Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669. "A servant," remarks Pollock, C. B., in *Dynen v. Leach*, 26 Law J. 221, "cannot continue to use a machine he knows to be dangerous, at the risk of his employer." In *McNeil v. Wallace*, 15 Court of Session Cas. 818, a collier sued his employer for an injury received by the fall of the roof of his excavation. It was the custom of the mine for the workmen, each to prop his own excavation, the wood for that purpose being furnished by the coal master at the mouth of the mine. No wood was furnished, but the workman went on to work, although it was, as the witness agreed, "a seen danger," and the workmen were warned of it. The court held, as he went on to work, he assumed the risk himself and could not recover of his employer.

Neither can the servant recover if his own neglect contributed to the injury. "In England, in Scotland, in every civilized country," remarks Lord Cranworth, in *Paterson v. Wallace*, 28 Eng. L. & Eq. 48, "a party, who rushes into danger himself, can not say, that is owing to your negligence." The master is not liable for the folly, the carelessness or the rashness of his servant. The plaintiff, to recover, must show ordinary care on his part.

The declaration should allege that the insufficiency of the bridge in question was unknown to the plaintiff, and that it was known to the defendant, or that, but for want of all proper care and diligence it would have been known. *Noyes v. Smith*, 28 Vt. 59; *Williams v. Clough*, 3 Hurl. & Nor. 258; but, as was remarked by Bramwell, B., in the case last cited, "that is a mere question of special pleading."

As the declaration is amendable on terms, we have determined the question presented as if it were free from all defects.

But the declaration, upon principle, must be deemed defective. Whether to be amended or not, and on what terms, will be determined at *Nisi Prius*, by the justice presiding.

Demurrer sustained; declaration bad; and exceptions overruled. TENNEY, CH. J., CUTTING, MAY, GOODENOW and DAVIS, JJ., concurred.

SHANNY (PER PRO AMI) V. ANDROSCOGGIN MILLS.

Supreme Judicial Court, Maine, November, 1876.

[Reported in 66 Me. 420.]

DUTY OF MASTER TOWARD SERVANT—MACHINERY AND APPLIANCES—REASONABLE CARE.—It is the master's duty, not only to provide suitable machinery for the use of the servant, and that which shall impose upon the servant no other or greater danger than is naturally incident to the business or employment, but to exercise all reasonable care in keeping it in the same condition (1).

FELLOW-SERVANT—VICE-PRINCIPAL.—The servant whose duty it is to keep machinery in repair is not a fellow-servant with one whose duty it is to use the same machinery, so that the master would be exempt from liability on that ground for an injury to the latter, in consequence of the neglect of the former.

DEFECTIVE MACHINERY—NOTICE—CONTRIBUTORY NEGLIGENCE.—A servant receiving an injury through a defect in the machinery caused by the negligence of the master cannot recover if he received such injury through a want of care on his own part, or in the disregard of a reasonable regulation of the master.

(*Official syllabus.*)

1. *Employee injured by circular saw—Master's knowledge of defect essential to fasten liability.*—In *HULL v. HALL ET AL.*, 78 Me. 114 (January, 1886), employee in defendant's saw mill injured by alleged defective circular saw whereby he lost all the fingers of one hand, defendants' exceptions, on verdict for plaintiff for \$935, were sustained. The ruling is stated in the official syllabus to the case as follows:

"A master's liability for an injury

to his servant caused by defective machinery furnished by the former for the latter's use is not absolute.

"To render the master liable for an injury to his employee caused by defective machinery furnished by the former for the latter's use, it must appear that the master knew, or by the exercise of proper diligence ought to have known of its unfitness, and that the servant did not know, or could not reasonably be held to have known of the defect."

ON EXCEPTIONS and motion for new trial. *Sustained.*

Case for an injury to the plaintiff, October 9, 1875, caused by the alleged negligence of the defendants in failing to keep a certain portion of their machinery, upon which the plaintiff worked, properly covered.

The declaration, after setting out matters of inducement, alleged that "the defendants knowingly, carelessly, negligently and wrongfully permitted said machinery and gearing to be improperly, defectively, and insufficiently covered, and for want of a proper and sufficient covering for said machinery and gear, all of which was unknown to the plaintiff, but was well known to the defendants, the plaintiff who was then and there in the said employment of said defendants, and by their special direction was with due care, cleaning said machinery and gear, then and there, without any fault of her own, and by reason of said improper, defective and insufficient covering of said machinery and gear, was caught by her right hand in said machinery and gear, and thereby the said hand of the plaintiff was greatly injured and damaged, so that the plaintiff entirely lost two fingers of her said hand, and lost the use of the third finger of said hand," etc.

Plea, the general issue.

It was not denied that the plaintiff, in the employ of the defendants, was hurt to the degree alleged, and that it occurred by her fingers being caught in the gearing, while wiping the ends of the machinery when in motion.

It appeared that the covering or fencing had been broken a few weeks before, and that the new castings which were necessary for repairs were finished; and that it was through the negligence of a servant of the corporation that they were not returned so that the repairs could be completed before the plaintiff was hurt.

As to the precise spot where plaintiff's fingers were caught, there was conflicting evidence, but by the findings of the jury, it was where there was a defect — a want of covering — for which the defendants were at fault.

It was in evidence that even when the machinery was fenced in the customary way it was not free from danger, and that, although it was the duty of the employees, such as this plaintiff was, to wipe the ends of the machinery, there was a time set apart for that purpose, and that they were expressly forbidden, by a rule of the corporation, to wipe those ends while

the machinery was in motion, and that this plaintiff knew of the rule, and of the danger, and had once before been threatened with dismissal for stopping the machinery at an unreasonable time for the purpose of cleaning; that every Saturday at four o'clock, the machinery was stopped for this purpose, and that there was sufficient time after that, within working hours, to do the cleaning, and that this plaintiff was hurt on this Saturday afternoon, some fifteen minutes before four o'clock, while wiping the machinery then in motion.

The point was taken at the trial that the plaintiff, on account of her infantile age and inexperience, was not informed, made sensible of the danger and the degree of it. The evidence on this point was that she was some months more than fourteen years of age and that she had worked in cotton mills, in one capacity or another, more than four years.

The defendants at the trial, among other things, contended that if the jury found the alleged carelessness in the want of a proper covering for the machinery, and that the omission was occasioned by the carelessness of a fellow-servant whose duty it was to repair it, then the defendants were not liable.

The presiding judge, among other things to which no exceptions were taken, charged the jury as follows:

"It is a rule of law, that where there are different persons engaged in the same employment, so that they are what are called fellow-laborers or fellow-servants, if one of them is injured by the careless act of another, the master is not liable; that they take the risk upon themselves, when working together in their common employment; that while the person injured might have a remedy against the careless servant, he would have none against the master. That is a well-settled rule of law. But I instruct you, it does not apply to an omission on the part of the master or employer. It does not apply to the machinery and the putting of it into proper condition. It is the duty of the master, whether the master is a corporation or a natural person, to furnish suitable machinery for carrying on his work; and for any omission to guard it properly, the master is liable. At any rate, this is not a case where the rule in relation to the carelessness of a fellow-servant applies: If some act of one of the laborers in the same room with the plaintiff — or if in doing their work one of the other girls employed in this mill had done a careless act and thereby injured the plaintiff, the defendants

would not be liable. But where the alleged carelessness relates to the machinery or the roads or bridges connected with a factory, and constituting a part of it, if there is an omission, it is the omission of the master or employer in contemplation of law; so that the doctrine in relation to the carelessness of fellow-servants does not apply."

The verdict was for the plaintiff; and the defendants seasonably filed a motion to set aside the verdict as against law and evidence, and for a new trial, and also alleged exceptions to so much of the charge of the presiding judge as is hereinbefore set forth. *Motion sustained.*

L. H. HUTCHINSON and A. R. SAVAGE, for plaintiff.

W. P. FRYE, J. B. COTTON and W. H. WHITE, for defendants.

Danforth, J.—This is an action by an employee against her employer to recover damages for a personal injury resulting from an alleged defect in the machinery provided for her use. It depends upon the obligations of the master to his servant while in his employment. The action has been submitted to a jury and comes before us upon exceptions and a motion for a new trial.

The presiding justice gave the rule of law contended for by the defendants so far as it relates to their liability for an injury to the plaintiff resulting from the negligence of a fellow-servant. But he further instructed them that "this is not a case where the rule in relation to the carelessness of a fellow-servant applies." He then states where the rule does apply, and goes on to say, "but where the alleged carelessness relates to the machinery or roads or bridges connected with a factory, and constituting a part of it, if there is an omission, it is the omission of the master or employer, in contemplation of law."

The first part of this instruction is clearly correct. The declaration alleges an omission and neglect on the part of the defendants. It sets out no other cause of action. Whatever may have been the facts, or whatever may be the law in relation to the liability of the master for the negligence of his servants, in this action, if the plaintiff can recover it must be on the ground set out in her writ, that of an omission amounting to culpable negligence on the part of the defendants. True, this omission need not necessarily be personal — in the present case a corporation being defendant it could act only by servants or agents — but it must be such if on the part of an employee as to be imputable to or legally that of the employer.

From the remainder of the instructions the jury could only infer that the defendants would be directly responsible for all defects in the machinery furnished, and under the writ and the facts in the case, not only to exercise the proper care in providing fit and suitable machinery for the purpose intended and that which is as reasonably safe as its use will permit, but to use the same degree of care in keeping it in that condition. The degree of care requisite was undoubtedly explained to the jury, as no objections are raised upon that point. The objection seems to be that by the instruction, where in a case of this kind it is shown that through the want of such care of the machinery as the law requires it is permitted to become and remain in a dangerous state, the fault is imputable to the master or employer, and he can not excuse himself on the ground that it was through the negligence of an agent or servant.

This we have no doubt is good law. No objection is or could successfully be made to it as applicable to the machinery furnished in the first instance. It is now too well settled to be doubted that the servant under his contract for service assumes such risks only as are incident to his employment. These risks include the use, not the purchase, of the machinery, as well as the dangers resulting from the carelessness of a fellow-servant, not the responsibilities of hiring, in the first instance. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, and cases cited (1).

The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when in the exercise of due care he should have known it, as if he had been wanting the same care in hiring. The same may very properly be said of the machinery. The servant has no more control of the repairs than of the purchase, no more responsibility for the one than for the other. The use of it is for him, and the risk of that use whatever it may be he assumes. That comes within his contract; but, as part of the same contract, the employer provides the means of carrying on the business; and as a matter of

1. The *COOMBS* case is reported with the Massachusetts cases in this volume, page 506, *post*.

course he assumes the responsibility that his work shall be done with due care; and, as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first.

This doctrine has been so fully and satisfactorily discussed that it is unnecessary to do more than to refer to some of the later decisions. *Buzzell v. Laconia Manufacturing Co.*, 48 Me. 113, 15 Am. Neg. Cas. 256, *ante*; *Gilman v. Eastern R. R. Co.*, 13 Allen, 433; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Cayzer v. Taylor*, 10 Gray, 274, 275 (1).

It is, however, claimed that the machinery became injured and dangerous, if it were so, without the fault of any one and that its continuance in that condition to the time of the injury, if the result of negligence, was the fault of the superintendent whose duty it was to keep the machinery in repair and was, therefore, the carelessness of a fellow-servant, a risk which the plaintiff assumed. The facts contained in this proposition may be admitted. If the law is correct, undoubtedly the instructions were wrong as being too broad. The effect of them was as claimed; they took from the jury the consideration of these facts. But the principle of law here claimed is fallacious in several respects. Assuming that the superintendent was negligent, that negligence was indeed a remote but not the proximate cause of the injury. This was the immediate and necessary result of the defective machinery. It is only when the carelessness of a fellow-servant, in the use of the machinery or independent of it, causes the injury that it can be said to be the efficient cause so as to exempt the master. In this case the defective machinery, for which the master was responsible, intervened between the carelessness and the injury and was of itself an independent and efficient cause of the accident.

Besides, the person whose duty it was to keep the machinery in order, so far as that duty goes, was not in any legal sense the fellow-servant of the plaintiff. To provide machinery and keep it in repair, and not use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one can properly be said to begin only when

1. The cases cited are reported on pages 426, 417, 427, 308 and 500, *post*.

the other ends. The two persons may indeed work under the same master and receive their pay from the same source; but this is not sufficient. They must be at the time engaged in a common purpose or employed in the same general business. *Shearm. & Redf. on Neg.*, §§ 100 and 108. We do not now refer to the different grades of service about which there is considerable conflict of opinion, but of the different employment. In the repair of the machinery the servant represented the master in the performance of his part of the contract and, therefore, in the language of the instructions, his negligence in that respect, is the "omission of the master or employer, in contemplation of law." *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, p. 260 (1).

The plaintiff, so far as regards the repair of the machinery, stands in the same position as any person not a servant but who was rightfully in her position; and the same responsibilities and liabilities rest upon the master for acts of himself or servant as would in such a case. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, p. 599. The instructions are in accordance with well-settled principles of law, and the exceptions must be overruled.

This brings us to the motion for a new trial on the ground that the verdict is against the law and the evidence. There appears to be but little conflict of the testimony in the case; and such conflict is perhaps more apparent than real. As to the place where and the manner in which the accident happened the testimony comes mainly from the plaintiff, and though some of the circumstances proved by other witnesses tend to throw doubt upon her statement, the jury must have found it substantially true, and we see no reason to disturb their finding in that respect. We assume, then, that she was injured through a defect in the machinery and one for which the defendants were liable, the defect having existed for so long a time that its condition must be imputed to culpable neglect on the part of the defendants.

But this alone is not sufficient to enable the plaintiff to maintain her action. She might herself have assumed all the risk and danger arising from the condition in which the machinery was. The duty of the master to furnish reasonably

1. The *FORD* case is reported with the Massachusetts cases in this volume, page 427, *post*.

safe and suitable machinery is one which the servant may waive, and it is claimed^a that she did so in this case.

The employer may undoubtedly exercise his own judgment as to the kind of machinery he will use, as well as to the condition in which it shall be kept. Having due regard to the rights of others he may do that which in his own view his interest may dictate or he may even be careless of that interest. But if he elects to use machinery unsuitable, or permits it intentionally or carelessly to get out of repair so that in its use the employee incurs more danger than fairly and naturally belongs or is incidental to the business or employment, another and a somewhat different duty devolves upon him. In such case he is required to give such information to the servant as will enable him to enter into his contract intelligently and with a full understanding of the unusual dangers he is to encounter. As ordinarily the employee assumes the responsibilities of such dangers as are naturally incident to the employment, so, by the same rule, in the absence of any evidence to the contrary, his contract is presumed to cover all the risks of which he has knowledge. *Sullivan v. India Manufacturing Co.*, 113 Mass. 396. To relieve the master from liability upon this ground it must appear not only that the servant had knowledge of the insufficiency of the machinery, but that his age and experience or the instructions given him by the master or some one in his behalf were such as to enable him fully to understand and appreciate the dangers attending the employment. That he assumes the ordinary risks, the law will infer from the contract of service. If the master would impose upon him the extraordinary risks the burden is upon the master to show as matter of fact that such was the contract. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, pp. 585-6; *Shearm. & Redf. on Neg.*, § 94, and note. Mere knowledge, or even appreciation, of the danger would not in all cases lead to the conclusion that the servant had assumed the risk. If such were the condition of things at the beginning of the service, the inference would follow. But if the danger arose from subsequent neglect with an expectation that repairs would be made with due diligence, it would seem that the servant might continue work with no more assumption of risk than would follow from such delay only as due diligence, would allow, though undoubtedly if by neglect of the master dangers accumulate, the servant, at his option, may abandon the contract.

In the case at bar the plaintiff not only had knowledge of the defect complained of, but, if we may believe the testimony, was fully instructed in and cautioned against the changes. She herself states in her cross-examination, "I knew all about it, knew it was dangerous." She had also had the benefit of considerable experience in the business. But if this were all we might hardly feel justified in setting aside the verdict. The plaintiff was of a tender age; the jury saw her upon the stand and had full opportunity of judging of her intelligence and capacity, of appreciating the situation in which she was placed by what may be fairly assumed as the culpable negligence of the defendants. They also viewed the premises and saw the machinery as it was at the time of the accident, and though we discover no lack of intelligence on her part, from the reported testimony, their better opportunities may have justified their finding upon this point.

But this is not all. It is difficult to understand how the jury could have found that she, even for one of her age, was herself in the exercise of ordinary care. The testimony not only fails to show this affirmatively, but very clearly shows the contrary. That she had knowledge of the danger is conceded. This not only has a bearing upon the nature of the contract, but is entitled to very grave consideration upon the question of due care. It is not conclusive in all, or perhaps in most cases. *Reed v. Northfield*, 13 Pick. 94; *Whittaker v. Boylston*, 97 Mass. 273. But it is often of great weight, depending upon the accompanying circumstances. If, as in *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572, the plaintiff's attention is for the time withdrawn from the danger by the requirements of the employment, its probative force would be diminished. But in this case the plaintiff's employment at the time of the injury was such as necessarily to direct her attention to the danger. She was not using the machinery, so much as she was at work upon it, and if her attention was upon her work it must also have been upon that which caused the injury. Hence, we can hardly account for the injury except upon the ground of inattention to her duties, as well as to the danger, the existence of which she was by no means ignorant.

But a matter more decisive of the plaintiff's right to recover is the fact that the only inference which can be drawn from the testimony is that her injury came to her while disobeying a rule adopted by the defendants regulating the very work in

which the plaintiff was engaged. That the defendants had the right to make the rule is not denied. That it was reasonable and proper is evident from the fact that it was made for the protection of the operatives, and if obeyed this injury could not have happened. It was in fact an indulgence to the servant. In relation to this matter, there is little or no conflict of testimony. The plaintiff, by her own admission, fully understood that the frame was to be stopped at four o'clock for the purpose of cleaning the gearing. She says that did not give her time; but from her own testimony, as well as from that of others, there was an abundant time to clean the ends where the danger was, after the mill had stopped. Other parts of the frame could be cleaned with safety when the mill was running, this could not. She claims that she understood that she must clean it running, or "be sent out" if she stopped it, and says on one occasion she was so threatened.

But from her own statement it appears that she had stopped it out of time, and it does not appear that she stopped for the purpose of cleaning the ends. The testimony so decided shows a want of due care on her part, and that the injury occurred while she was acting contrary to a regulation made for her own protection, that we conclude that the verdict of the jury was the result of a failure to comprehend the case, or of a prejudice so strong as to prevent a candid exercise of their judgment.

Motion sustained. APPLETON, CH. J., DICKERSON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

NASON V. WEST ET AL.

Supreme Judicial Court, Maine, May, 1886.

[Reported in 78 Me. 253.]

EMPLOYEE CLEANING OVEN INJURED BY THE OVEN FALLING IN UPON HIM—NOTICE OF DEFECT—EVIDENCE.—The plaintiff was employed by the defendants to remove the sand or "form" from a large oven which had been recently built by workmen employed by the defendants' lessor. After having taken it nearly all out by means of shovels and other tools furnished him by another servant in the employment of the defendants, the plaintiff crawled into the oven for the purpose of cleaning out the corners, and while in there the oven fell in upon him, burying him in brick, sand and mortar, and causing the injuries for which this suit is brought. There was no

evidence that the defendants had any knowledge of the dangerous condition of the oven at the time the plaintiff met with the accident, or that they were negligent in not knowing it: *Held*, that the verdict in favor of plaintiff could not be sustained.

NOTICE OF DEFECT — BURDEN OF PROOF.— In order to entitle the plaintiff to recover, it must be shown that the defendants knew, or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect which led to the injury.

PRESUMPTION OF NEGLIGENCE.— The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants, or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict.

NEGLIGENCE MUST BE PROVED — SCINTILLA OF EVIDENCE NOT SUFFICIENT.— Negligence being the basis of the plaintiff's action, it must be proved by evidence having legal weight, and upon which the verdict of a jury would be allowed to stand. A mere scintilla of evidence is not sufficient.

(*Official syllabus.*)

ON MOTION to set aside the verdict for plaintiff for \$245. (York County.) The case is stated in the opinion. *Motion sustained and verdict set aside.*

HAMILTON & HALEY, for plaintiff.

H. FAIRFIELD, for defendant.

Foster, J.— The defendants are lessees of a baker's shop at Old Orchard. In the rear of the building and near to it was the oven, first built by the lessor in the summer of 1883, in accordance with the stipulations in the lease from him to these defendants. This oven having been in use during that season, and owing to the high degree of heat necessary to its successful operation, some of the brick around the fire-box had melted, rendering it necessary to rebuild it. Accordingly, the next summer the lessor, having his attention called to it, caused the oven to be rebuilt, employing a mason of many years' experience, the same man who had constructed it the year previous. In the formation of the arch or roof of the oven the bricks were laid over a "form" composed of damp compacted sand. A few days after the oven was completed, the defendants being ready to commence that season's business, engaged the plaintiff to go to Old Orchard with one of their workmen by the name of Roaks, to remove the sand from the oven. After having taken it nearly all out by means of shovels and other tools furnished him by Roaks, he crawled into the oven for the purpose of cleaning out the corners. While in there the oven fell in

upon him, burying him in brick, sand and mortar, and from which situation he was rescued a few minutes later, having received some slight injuries, and for which this action is brought.

The principles relating to the liability of the master for injuries received by the servant in the course of his employment are well defined, and have been frequently stated in judicial decisions. It only becomes necessary to make a proper application of them here, and by those well-settled principles determine whether the verdict of the jury should be sustained.

The action set forth in the plaintiff's writ is founded on a charge of negligence. It is the gist of the action, and being alleged it must be proved. The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants, or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict. Negligence upon the part of the defendants being the basis upon which the plaintiff founds his action, it is to be proved. Presumption of negligence from the fact alone that an accident has happened will not do; for if there is any presumption in such a case it is that the defendants have complied with those obligations which rest upon them equally with other men.

There are cases, to be sure, like those against depositaries, innkeepers and common carriers, where property is lost which is confided to them, or where the nature of the accident or attending circumstances is such that negligence may be presumed from the act. But in the ordinary class of cases, of which the one before us forms no exception, the burden lies upon the plaintiff to prove the negligence which he alleges. And while it is true that this may be done by proof of facts from which it may reasonably be inferred that the defendants' negligence caused the injury complained of, it is equally true that a mere scintilla of evidence is not sufficient. It must be evidence having legal weight and upon which the verdict of a jury would be allowed to stand. *Connor v. Giles*, 76 Me. 134; *Beaulieu v. Portland Co.*, 48 Me. 296, 15 Am. Neg. Cas. 253, *ante*; *Cornman v. R'y Co.*, 4 H. & N. 781, 784 (1); *Toomey v. R'y Co.*, 3 C. B. N. S. 146, 149; *Cotton v. Wood*, 8 C. B. N. S. 568 (2).

1. See note of the *Cornman* case on page 256, *ante*.

2. The facts in *Toomey v. London, B. & S. C. R'y Co.*, 3 C. B. N. S. 146,

And in order for the plaintiff to be entitled to recover in this action it must be shown that the defendants owed some duty to him and that there was a neglect of that duty. If the plaintiff received an injury as the result of an accident solely, and the defendants were without fault, the action is not maintainable. Ever since the decision in the case of *Priestley v. Fowler*, 3 M. & W. 1 (1), in the English Court of Exchequer, it has been held

were as follows: On the platform of a railway station there were two doors in close proximity to each other; the one, for necessary purposes, had painted over it the words "for gentleman," the other had over it the words "lamp room." The plaintiff having occasion to go to the first-named place asked a stranger where he should find it, and being told, he, by mistake, opened the door of the lamp room, fell down stairs and was injured. Held, that in the absence of evidence that the place was more than ordinarily dangerous, non-suit was justified on the ground that there was no evidence of negligence on the part of the railway company.

It was held in *Cotton v. Wood*, 8 C. B. (N. S.) 568, that it is equally the duty of persons crossing a street or a road to look out for vehicles coming along, as it is for the drivers of those vehicles to be vigilant in not running against persons crossing. Therefore a person suing an owner of a vehicle for negligence by and through the misconduct of his servant, in running over him while crossing a thoroughfare, must, in order to succeed, give affirmative and preponderant evidence of neglect of duty on the driver's part. It is established, that where the evidence on each side, in cases of this kind, is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way.

1. In *Priestley v. Fowler*, 3 M. &

W. 1, it was held that a master is not liable to an action at the suit of his servant, for an injury sustained by the latter, caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware. The declaration in the case stated that the plaintiff was a servant of the defendant in his trade as a butcher; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey; that the plaintiff in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van, with the goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured. Held, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

that the mere fact of relationship of master to servant, without a neglect of duty, does not impose upon the master a guarantee of the servant's safety.

The plaintiff, however, alleges that there was such neglect on the part of the defendants in not notifying him of what he claims to be the insufficient and dangerous construction of the oven, of which the defendants were aware, but of which the plaintiff was ignorant; and his claim is that he was employed by the defendants to enter this oven which was so defectively constructed that it fell upon and injured him.

Before the plaintiff could be entitled to a recovery upon the allegations set up in his writ, it must be shown that the defendants knew, or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect, if such it was, which led to the injury. Knowledge on the part of the defendants, or such lack of it as would render them culpably liable, and ignorance on the part of the plaintiff, of the alleged danger or defect, are essential prerequisites to the maintenance of this action. Beach, *Contrib. Negl.*, § 123; Shearm. & Redf. *Negl.*, § 99.

Thus, in the recent case of *Griffiths v. London & St. K. Docks Co.*, 12 Q. B. Div. 495, afterwards affirmed in the High Court of Appeal, 13 Q. B. Div. 259, the plaintiff, at the time of the accident, was in the employment of the defendant company when one of the large iron doors upon the defendant's premises where the plaintiff was at work suddenly gave way and fell upon the plaintiff; the court there say: "If the master employs a servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequence of any danger there may be in it. The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. If the master requires the servant to do something out of the ordinary course of his employment and dangerous, the servant may disobey him. It is clearly the duty of the master to communicate a danger which he knows and which the servant does not. It is necessary to allege that the servant does not know of the danger, because if the servant knows of the danger and does the act which may and does cause injury to him, he has

nothing to complain of, and cannot bring an action for the damage sustained" (1). From the numerous decisions sustaining the doctrine above laid down, we select a few of the most important ones in different courts. *Welfare v. London & Brighton R'y Co.*, L. R., 4 Q. B. 693, 696 (2); *Priestley v. Fowler*, 3 M. & W. 1 (3); *Ind. R. Co. v. Love*, 10 Ind. 554, 14 Am. Neg. Cas. 518ⁿ; *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 566; *Hayden v. Smithville M'fg Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Buzzell v. Laconia M'fg Co.*, 48 Me. 113, 15 Am. Neg. Cas. 256, *ante*; *Hull v. Hall*, 78 Me. 114, 15 Am. Neg. Cas. 264, *ante*.

In the case of *Ind. R. Co. v. Love*, 10 Ind. 554, 14 Am. Neg. Cas. 518ⁿ, the court held that the corporation was liable in allowing an employee to pass over a defective bridge, known to the corporation, and not known to the servant. If the company knows, or both the company and servant know, the company is not liable unless it gives special directions, remarks the court in that case.

It was said, in *Wheeler v. Wason M'fg Co.*, 135 Mass. 298 (4), that where the servant is as well acquainted as the master with the dangerous nature of the service in which he is engaged, he cannot recover. And the early case of *Priestley v. Fowler*, 3 M. & W. 1 (5), was where an action was brought by a servant against the master for injuries received in consequence of the breaking down of an overloaded van, and it was held that the master was not liable, because the fact that the van was overloaded was as well known to the servant as to the master.

1. The Griffiths case is sufficiently stated in the opinion in the case at bar

2. In *Welfare v. London & Brighton R'y Co.*, L. R., 4 Q. B. 693, 696, it appeared that plaintiff, an intending passenger, was directed to look at a time table, in response to an inquiry by him, which time table was hanging outside of the door of the booking office under a covering or portico, and while looking at the same he was injured by a plank and a zinc roll which fell through the covering, through which covering a man's leg protruded. Plaintiff brought suit

against the railway company but was nonsuited, it being held there was no evidence of negligence to go to jury, it not being shown that the railway company knew that the covering was insecure, nor that the man upon it was employed by the company.

3. See note of *Priestley v. Fowler* on page 276, *ante*.

4. Reported with the *Massachusetts* cases in this volume, *post*.

5. See note of this case on page 276, *ante*.

So in *Welfare v. Brighton R'y Co.*, L. R., 4 Q. B. 696 (1), Cockburn, Ch. J., said: "In order to make out negligence on the part of the company, and make the company liable for allowing that person to go on the roof, the plaintiff must show either that the company knew or had the means of knowing, or were bound to take steps to know the state in which the roof was. As to that the case is entirely bare of all evidence. It does not at all follow that because the roof of a building may require repairing, and a workman is directed to go on it to repair it, the person giving the direction knows that the roof is in such a state that if the workman steps upon it, it may give way under him."

Applying the foregoing principles to the case at bar, with all the evidence before us, we are satisfied that the verdict can not stand. There is no evidence upon which a jury could properly find that the defendants knew of any dangerous condition of the oven at the time the plaintiff met with the accident. If the construction was defective, there is no evidence that the defendants knew of it, or that it was of such a character that the lack of knowledge was culpable.

The oven had been recently rebuilt by the party who leased the premises to the defendants. The defendants neither employed nor paid the party who built it, nor was it built under their inspection or superintendence. The cause of the falling in of the oven seems to be shrouded in a mystery which neither the evidence nor the counsel upon either side is able to explain, and it is left uncertain whether it fell from any inherent defect, or from some act of the plaintiff, as a moving cause, while at work within it. Nor do we think that the fact of the oven having been cracked and some of the bricks around the fire-box having melted the previous summer, renders the defendants chargeable with knowledge of any defect or dangerous condition of the oven in which the accident happened. This was a new oven. The defect existing the year before was no longer in existence. It was not in fact the same oven that was there the year before. As well might it be said that a town should be held to have knowledge of a defect in a way, that existed the year before, when the way the next year, and before the accident, had been entirely rebuilt.

What greater knowledge of the condition of this oven could the defendants have had than the plaintiff himself? They had

1. See note of the *Welfare* case, on page 278, *ante*.

not greater opportunity for examining the inside of it than the plaintiff; it was completely filled with sand, placed there when it was constructed, and the plaintiff's employment was to remove it. What examination would have revealed the fact that the arch would fall after the sand was removed, except by such removal?

If the plaintiff had equal knowledge with the defendants before he commenced the work, then he must be considered as assuming the risk, and consequently the defendants would not be liable. *Beaulieu v. Portland Co.*, 48 Me. 296, 15 Am. Neg. Cas. 253, *ante*; *Shanny v. Androscoggin Mills*, 66 Me. 428, 15 Am. Neg. Cas. 264, *ante*.

Motion sustained and verdict set aside. PETERS, CH. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

EMPLOYEE INJURED BY MACHINERY IN SAW MILL—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—In **CAMPBELL v. EVELL**, 83 Me. 50 (*September, 1890*), where plaintiff, while operating a lath machine in defendant's saw-mill, had his right hand so injured that it had to be amputated, the case was ordered to stand for trial, the question of contributory negligence being for a jury. The official syllabus states the case as follows:

"An inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention; but of such only as he knows, or by the exercise of ordinary care ought to know.

"When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury.

"A majority of the court are of the opinion that the case falls within this principle." Opinion by VIRGIN, J., in which PETERS, CH. J., LIBBEY, FOSTER, HASKELL and WHITEHOUSE, JJ., concur. A dissenting opinion was rendered by EMERY, J., in which WALTON, J., concurred.

MUNDLE V. HILL MANUFACTURING COMPANY.

Supreme Judicial Court, Maine, May, 1894.

[Reported in 86 Me. 400]

ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.—Assuming the risks of an employment by a servant while in the service of the master, is founded upon an essentially different principle from incurring an injury through contributory negligence.

SAME—The servant may be debarred from a recovery against the master when he voluntarily assumes the risk, but this is not identical with the principle on which the doctrine of contributory negligence rests.

SAME—KNOWLEDGE OF DANGER—One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger.

SAME—Mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk.

DUTY OF MASTER TO FURNISH SUITABLE APPLIANCE AND PLACE TO WORK.—It is the duty of the master to provide suitable instruments with which, and a proper place where, the servant may perform his work, subject only to such risks as are necessarily incident to the business.

ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.—But a servant of sufficient age and intelligence to understand the nature of the risk to which he is exposed, may waive this obligation which is due to him from the master, or may dispense with it altogether.

Having full knowledge and appreciation of the dangers to which he is exposed, and consenting to serve in the way and manner in which the business is conducted, he has no legal ground of complaint even if reasonable precautions have been neglected by the master, and an injury is received.

(*Official syllabus.*)

ON MOTION and exceptions. (Androscoggin.) The case appears in the opinion. *Exceptions sustained.*

F. W. DANA and W. F. ESTEY, for plaintiff.

WALLACE H. WHITE and SETH M. CARTER, for defendant.

SITTING: PETERS, CH. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

Foster, J.—The plaintiff had been in the employ of the defendant as an inspector of cloth for about three months at the time of the accident. In the performance of her work she had occasion to pass from her inspecting table to the stitcher, a distance of about twenty feet, across the room from 100 to 125 times a day. While walking across the floor she stuck a splinter from the floor into her foot, for which injury this

action was brought, and the jury awarded her damages in the sum of \$500.

The undisputed facts gathered from the plaintiff's own story are that she knew the condition of the floor, had walked on it for three months, and had noticed that it was not what it should be and was always very careful; that she considered it dangerous and was always very careful in walking back and forth; that she had it in mind all the time; that there was no occasion for her to hurry, and that she could go back and forth from the inspecting table to the stitcher carefully and leisurely; that the room was well lighted; that the floor over which she had occasion to pass was not covered up or concealed in any way, and was in about the same condition at the time of the accident as when she began to work there; that the wearing and splintering of it was occasioned by iron trucks heavily loaded with cloth passing over it many times a day; that she never spoke to the overseer or made any complaint to any one about the condition of the floor; and that she was not induced to remain under any promise of a change or repair. It also appeared that the plaintiff at the time of the accident had on a shoe torn across the toe, and that the splinter entered her foot at the point where the shoe was torn.

The defendant contended that the plaintiff having continued to work during all this time with full knowledge of the condition of the floor and the uses to which it was put, without making any complaint or calling the attention of the overseer or any other person representing the defendant to the alleged dangerous condition, and not being induced to continue in her work by any promise that a change would be made, assumed the risks involved, among which would be the liability of her feet being injured by splinters.

The jury, after having been fully instructed, and after deliberating upon the case for some time, returned into court and asked the following question:

"If the plaintiff went onto this floor seeing all the danger there was about it,—if she saw everything there was there and the condition of the floor,—and continued to work upon it, if the floor was faulty, would she be entitled to recover?"

Thereupon, in response to this inquiry, the following instruction was given by the court:

"That is a question which has often been before the courts, and in some of the States it has been held that such knowledge is a bar to a recovery. But we have not gone so far as that

in this State. We hold that it is possible for one to continue in the service of another after knowing that the premises or some of the machinery is dangerously and negligently defective, and that such knowledge is not necessarily a bar to a recovery for an injury occasioned by such a defect. Such knowledge is a circumstance to be weighed by the jury in determining whether or not the person injured was guilty of contributory negligence, but is not necessarily a bar to a recovery. If you think that under all the circumstances the plaintiff was excusable,—that is, that she was not guilty of contributory negligence,—and you also find that the floor was defective and dangerous, you will be justified in finding a verdict in her favor. It is requiring a good deal of a girl (or any one) who is obliged to work for a living, and has a good position, to leave it or continue in it at her own risk, simply because she knows of some defect carelessly or negligently left by her employer. She has a right to assume that in due time he will make the necessary repairs, and upon that assumption, she may work on; and if, in so doing, there is no want of ordinary care on her part, mere knowledge of the defect is not a bar, not a legal bar, to a recovery for an injury occasioned by the defect. But such knowledge is a circumstance to be weighed by the jury in determining whether or not the person injured was guilty of contributory negligence; and upon that question their judgment must control."

To this instruction the defendant excepts and the question is as to its correctness, as applied to the undisputed facts in this case, and those assumed in the question.

In this connection, we feel that the instruction as given must have misled the jury, and their attention should have been called to the distinction between a right of recovery being barred by contributory negligence, and by the voluntary assumption of a known and appreciated risk or danger.

The question presupposed both a defective floor and a full knowledge on the part of the plaintiff of all danger incident to its use, and called for instructions as to whether the plaintiff could recover if she knew and appreciated the danger and voluntarily assumed the risk. The instructions wholly omitted to deal with this aspect of the case, and were limited to the question of contributory negligence, thereby leaving the jury to determine whether such knowledge should preclude the plaintiff from recovering on the ground of contributory negli-

gence alone, and not by reason of her voluntarily assuming a risk or danger fully known and appreciated by her.

Assuming the risks of an employment is one thing, and quite an essentially different thing from incurring an injury through contributory negligence. Generally, it is sufficient, in actions for the recovery of damages, to give instructions as to the effect of contributory negligence on the part of the plaintiff. But when the question arises as to the effect of knowledge and the assumption of risks on the part of the plaintiff, something more is required. As was said in *Miner v. Conn. River R. R.*, 153 Mass. 398 (1), "The principle that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may with his eyes open undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances."

The difficulty often arises in determining whether the risk has been voluntarily assumed. One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. Nor does he, on the other hand, necessarily fail to appreciate the danger because he hopes and even expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture.

It is well settled that a servant by entering the service of the master assumes all known or apparent risks which are incident to it, however dangerous the service may be, even if it might be conducted more safely by the employer. On the other hand, it is a part of the contract which is implied, that the master shall provide suitable instruments with which, and a proper place where, the servant may perform his work with safety, or subject only to such risks as are necessarily incident to the business. But it is in the power of the servant, having sufficient age and intelligence to understand the nature of the risk to which he is exposed, to waive this obligation on the

1. The *MINER* case was an action for injury to property.

part of the employer, or dispense with it altogether. This doctrine is firmly established by numerous decisions, and is stated with such clearness in the case of *Sullivan v. India Manuf'g Co.*, 113 Mass. 396 (1), that we quote the following language from the opinion of the court, in reference to the servant assuming risks: "When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."

There is a class of cases which recognizes the doctrine, as we have stated, that mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. *Linnehan v. Sampson*, 126 Mass. 506; *Williams v. Churchill*, 137 Mass. 243; *Taylor v. Carew Manf'g Co.*, 140 Mass. 150; *Scanlon v. Boston & Albany R. R.*, 147 Mass. 484 (2). Also the recent English cases of *Thomas v. Quartermaine*, 18 Q. B. Div., 685, and *Yarmouth v. France*, 19 Q. B. Div. 647, where this doctrine is fully sustained (3).

But in addition to what we have already stated in reference to the power of the servant to waive or even dispense with the obligation which the employer is under to him, the decisions of our own court, as well as elsewhere, hold that a plaintiff may be precluded from recovering when he voluntarily assumes a risk which he knows and appreciates, whether existing at the time he enters the service or coming into existence afterwards. It is in this class of cases that the principle expressed by the

1. The *Sullivan* case is reported with the Massachusetts cases in this volume, p. 527, *post*.

2. See the cases reported with the Massachusetts cases in this volume, *post*.

3. For a full discussion of the cases

of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, and *Yarmouth v. France*, 19 Q. B. Div. 647, together with numerous American and English cases on the doctrine *volenti non fit injuria*, see *Birmingham R'y, etc., Co. v. Allen*, 99 Ala. 359, reported in 13 Am. Neg. Cas. 77-94.

maxim, *volenti non fit injuria*, has the effect to debar the plaintiff from a remedy which might otherwise be open to him.

In *Leary v. Boston & Albany R. R.*, 139 Mass. 580 (1), the principle that no one can maintain an action for a wrong where he has consented to the act which has occasioned his loss, is thus expressed: "But the servant assumes the danger of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

This principle, founded upon the maxim, *volenti non fit injuria*, is recognized in our own State in *Buzzell v. Laconia Manfg Co.*, 48 Me. 113, 15 Am. Neg. Cas. 256, *ante*, where the court say: "If the danger is known, and the servant chooses to remain, he assumes, it would seem, the risk and cannot recover." *Nason v. West*, 78 Me. 254, 257, 15 Am. Neg. Cas. 273, *ante*; *Coolbroth v. Me. Cent. R. R.*, 77 Me. 165 (2); *Judkins v. Me. Cent. R. R.*, 80 Me. 418, 425, 15 Am. Neg. Cas. 314, *post*.

In the case last cited this court say: "Even where a master fails in his duty in respect to inspecting and repairing the machinery or appliances to be used by the employee, and the servant voluntarily assumes the risks of the consequences of the master's negligence, with knowledge or competent means of knowledge of the danger, he can not recover damages of the master." The English decisions, whenever this question has arisen, have been in accord with this doctrine. *Griffiths v. London & St. Katherine Docks Co.*, 12 Q. B. Div. 495, afterwards affirmed in the High Court of Appeal, 13 Q. B. Div. 259 (3); *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 697; *Yarmouth v. France*, 19 Q. B. Div. 647, 656 (4); *Thompson Neg.*, § 973, and cases; *Shearm. & Redf. Neg.*, § 94; *Beach Contrib. Neg.*, § 139.

1. Reported with the Massachusetts cases in this volume, p. 490, *post*.

Judkins case is reported with the Maine cases on page 314, *post*.

2. The *Coolbroth case* relates to injury to persons engaged in throwing mail bags into train in motion. The

3. See note of the *Griffiths case*, on page 277, *ante*.

4. See note on page 285, *ante*.

It would not be just for one who has voluntarily assumed a known risk, or such as might be discovered by the exercise of ordinary care on his part, and for which another might be culpably responsible, to hold that other responsible in damages for the consequences of his own exposure to those risks which were known and understood by him.

The court in Massachusetts has recently given expression to what we believe to be in accordance with the views herein expressed in *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155 (1), in the following language: "Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he can not recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself and find that it was reasonably careful."

But in the case before us, we think the jury must have understood that they were to consider the question of negligence on the part of the defendant by itself, and the plaintiff's conduct by itself, and be allowed to find that she was reasonably careful, and hence entitled to recover, if there was negligence on the part of the defendant and due care on her part, notwithstanding she may have known and appreciated the danger and voluntarily assumed all risk. While the first part of the instruction may have been correct as an abstract proposition, yet followed as it was by this independent statement—"If you think that under all the circumstances the plaintiff was excusable, that is, that she was not guilty of contributory negligence, and you also find that the floor was defective and dangerous, you will be justified in finding a verdict in her favor"—the jury must have understood that the answer to their question presented but two propositions for their consideration, negligence on the part of the defendant, and freedom from contributory negligence on the part of the plaintiff.

1. Reported with the *Massachusetts* cases in this volume, *post*.

The question asked presupposes, as broadly as language can well state it, full knowledge and appreciation of the risk by the plaintiff. The defense relied upon it. The instruction bore upon the doctrine of contributory negligence, instead of the question of assumption of risk through knowledge of the defective condition of the floor. We think the jury should have been instructed in reference to the latter.

Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685 (1), makes use of this language, in speaking of the defense in that case, similar to that set up in this: "But the doctrine of *volenti non fit injuria* stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all."

As we have before remarked, the question presupposes a defective condition of the floor, and full knowledge and appreciation of the danger by the plaintiff.

Upon these assumed facts, as stated in the question, viewed in the light of the undisputed facts in evidence, we think the jury should have been instructed that the plaintiff would not be entitled to recover. *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 159.

Exceptions sustained.

CONLEY v. AMERICAN EXPRESS COMPANY.

Supreme Judicial Court, Maine, March, 1895.

[Reported in 87 Me. 352.]

ASSUMPTION OF RISK.—If a servant continues in the service of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger, he will be deemed to have assumed all risks incident to the service under such circumstances.

DEFECTIVE APPLIANCE—PROXIMATE CAUSE—ACCIDENT.—No action against the master is maintainable where there is no causal connection between the defective condition of the appliances and the plaintiff's injury. In such case the defect is not the real or proximate cause of the injury. In legal contemplation it is simply the opportunity for the operation of the true cause, the servant's own want of proper

1. See note on page 285, *ante*.

care; or the occasion for a purely accidental occurrence causing damage without legal fault on the part of any one (1).

(*Official syllabus.*)

ON EXCEPTIONS. Plaintiff was nonsuited on the trial of the cause. (Cumberland County.) The case is stated in the opinion. *Exceptions overruled.*

ARGUED before PETERS, CH. J., WALTON, EMERY, WHITEHOUSE and WISWELL, JJ.

A. W. BRADBURY and G. F. McQUILLAN, for plaintiff.

CHARLES F. LIBBY, for defendant.

Whitehouse, J.—This is an action brought by an employee of the defendant company to recover damages for a fracture of his knee-pan, alleged to have been sustained by reason of the defective condition of the iron track on which the wheels at the top of a sliding door, in the defendant's warehouse in Portland, were made to run, as the door was opened and closed. At the conclusion of the plaintiff's evidence, the presiding judge ordered a nonsuit, and the case comes to this court on exceptions to this ruling.

It is the opinion of this court that a verdict for the plaintiff could not properly have been allowed to stand on the evidence reported and that the nonsuit was therefore rightly ordered.

The plaintiff was twenty-five years of age and had been in the service of the defendant company some two years at the time of the accident. On the night of February 8, 1893, he had completed his task of transferring the express matter from the cars to the warehouse, and attempted to close one of the sliding doors, eight feet high and seven feet wide, on the front side of the building. According to his own testimony he had experienced difficulty in closing this door several days prior to this time, and on examination found that by reason of the absence of two screws, the rear end of the iron track on which the wheels ran, had sprung out an inch and a half or more. Thus, when the door was rolled back as far as it would go, "it would stick," and he had found it difficult to move it. He explained the defect to the agent, Mr. Durgin, at that time, and Durgin promised to repair it. The plaintiff says that on the evening in question he supposed it had been repaired, but

1. In *NELSON v. SANFORD MILLS*, 89 Me. 219 (May, 1896), employee injured by alleged defective elevator, his hand being crushed by the fall of the elevator, plaintiff's exceptions to verdict for defendant were overruled on the ground of contributory negligence.

finding that it stuck again, he stepped upon a box to find out what the trouble was. Thereupon a fellow-servant by the name of Sparrow came along and he asked him to assist in closing the door, saying to him: "When I tell you to pull, you pull it." Sparrow pulled when the word was given and the plaintiff, standing on the box and pushing in the same direction, lost his balance when the door moved, and fell forward on the floor, receiving the injury of which he complains. He also testified that, after the accident, he discovered that the trouble with the door was caused by the same defective condition of the track which he had explained to Mr. Durgin.

This statement of the facts discloses at least two fatal objections to the maintenance of the plaintiff's action.

In the first place he was entirely familiar with the condition of the hanging apparatus of the door, as well as of the effect upon the movements of it; and if a sliding door to a warehouse can reasonably be deemed a dangerous piece of mechanism because it binds and sticks when pushed back to the extreme limit, the plaintiff must have known and fully appreciated all such perils as might ordinarily be connected with the use of it. And it is now settled law in this State that if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances, in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances. Such an assumption of the risks of an employment by a servant will bar recovery independently of the principle of contributory negligence. *Mundle v. M'f'g Co.*, 86 Me. 400, 15 Am. Neg. Cas. 281, *ante*, and cases cited; *Miner v. Conn. River R. R. Co.*, 153 Mass. 398 (1).

But the more radical and fundamental objection is that there was no causal connection between the defective condition of the door-hanger and the plaintiff's injury. The injury was not the ordinary or probable result of the defect in the hanging of the door, but was due to a wholly unlooked for and unexpected event which could not reasonably have been anticipated or regarded as likely to occur. The defect was not the real or proximate cause of the injury. It was not a cause from which

1. The *MINER* case was an action for injury to property.

a man of ordinary experience and sagacity could foresee that such a result might probably ensue. It was simply the opportunity for the operation of the true cause — his own want of proper care; or the occasion for a purely accidental occurrence causing damage without legal fault on the part of anyone; for pure accidents have not yet been eliminated from the facts of human experience.

The evidence fails to establish any liability on the part of the defendant company.

Exceptions overruled.

SAWYER, ADM'X. v. PERRY ET AL.

Supreme Judicial Court, Maine, May, 1895.

[Reported in 88 Me. 42.]

DEATH — STATUTE.—The remedies provided by Statute 1891, chapter 124, entitled "An act to give a right of action for injuries causing death," are limited to cases where the person injured dies immediately.

Held, that the legislature intended by this act to extend the means of redress to a class of cases where none existed before; and not to give two actions for a single injury,—one for the benefit of the decedent's estate and another for the benefit of his widow and children or next-of-kin.

DEATH — PLEADING.—In an action to recover damages for negligently causing the death of a person, the declaration averred that the decedent lived about an hour, and in its original form was simply a common-law action based on the alleged negligence of the defendant. The writ was amended by an allegation that the action was brought for the benefit of the widow of the deceased. *Held*, that the amendment changed the character of the action, and was, therefore, demurrable.

DEATH — DAMAGES.—In its original form, the damages, if any are recovered, will belong to the estate of the deceased. In its amended form they will belong to the widow; and the amendment changes the rule by which the damages are to be assessed.

DEATH — WORDS — DEFINITION.—While other courts, and some writers of text books have used indiscriminately the words instantaneous and immediate, they do not, in this class of cases, mean precisely the same thing. An instantaneous death is an immediate death; but an immediate death is not necessarily and in all cases an instantaneous death.

(*Official syllabus.*)

ON EXCEPTIONS. (York County.) *Overruled.*

This was an action upon the case to recover damages alleged to have been sustained by reason of the negligence of

the defendants, and resulting in the death of Ralph S. Sawyer, the plaintiff's intestate.

The plaintiff moved to amend her declaration by inserting near the close thereof the words, "this action is brought for the benefit of said Sarah A. Sawyer, widow of said intestate, said intestate having died without children," and also the words "and as the person for whose benefit this action is brought," which amendment was allowed by the presiding justice, against the objection of the defendants, and was thereupon made.

To the declaration so amended the defendants then filed a general demurrer, which was duly joined, all of which was during the return of said action. The presiding justice sustained the demurrer so filed to the amended declaration and the plaintiff thereupon seasonably excepted to the ruling sustaining the demurrer as aforesaid.

It was stipulated by the parties that if the plaintiff's exceptions should be overruled by the law court and the plaintiff shall thereupon desire to again amend her declaration by striking out the amendment which was allowed by the presiding justice as aforesaid, the plaintiff should have the right to do so without the payment of costs.

The declaration, as amended, was based upon the following statute:

Chapter 124, Laws of 1891. "An act to give a right of action for injuries causing death."

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony.

"Section 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then to her and them equally, and, if neither, of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not

exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, provided, that such action shall be commenced within two years after the death of such person "

TRUE B. PIERCE, for plaintiff.

A. A. STROUT, C. A. HIGHT and J. W. SYMONDS, for defendants.

SITTING: WALTON, EMERY, HASKELL, WISWELL, STROUT, JJ.

Walton, J.—This is an action to recover damages for negligently causing the death of a person. The declaration alleges that Ralph S. Sawyer, while at work in the defendants' lime quarry, was killed by a stone which was negligently allowed to fall upon him.

The declaration avers that the decedent survived his injuries about an hour; and the suit, in its original form, was simply a common-law action, based on the alleged negligence of the defendants. But, by leave of court, the writ has been amended by inserting an allegation that the action is brought for the benefit of the widow of the deceased. This was an important amendment. It changed the character of the action. In its original form, the damages, if any had been recovered, would have belonged to the estate of the deceased. In its present form, the damages, if any are recovered, will belong to the widow of the deceased; and the amendment changes the rule by which the damages are to be assessed. The amendment, therefore, was important, and not a mere matter of form.

To this amended declaration, the defendants demurred. The object of the demurrer appears to have been to obtain a construction of the statute of 1891, chap. 124, entitled, "An act to give a right of action for injuries causing death."

The question argued is, whether the remedies provided by this statute (Act 1891, chap. 124), must not be limited to cases where the persons injured die immediately. It is the opinion of the court that they must. A similar statute has been so construed, and no reason is perceived why this statute should not receive the same construction.

In *State v. Me. Cent. R. R.*, 60 Me. 490, the court held that a statute giving a right of action by indictment against railroad corporations for negligently causing the death of a person, and declaring that the amount recovered should be for the benefit of the widow and children of the decedent, must be limited in its application to cases of immediate death; and this

decision was affirmed in *State v. Grand Trunk R'y*, 61 Me. 115 (1).

The court could not believe that the legislature intended to give two remedies for a single injury. It had become settled law in this State that if a person was injured through the negligence of another person, or a corporation, and afterwards died of his injuries, redress could be obtained by his personal representative. But it had been held in Massachusetts (and the law was assumed to be the same in this State) that if the person injured died immediately, no redress could be had. And it was believed that it was the intention of the legislature to remedy this defect. Not to give a new right of action, where ample means of redress already existed; but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed. And it was believed that full effect would be given to the legislative intention by limiting the new right of action to cases where the persons injured died immediately.

So, in this case, we can not believe that the legislature intended by the Act of 1891, c. 124, to give two actions for a single injury,— one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin. We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we can not resist the conviction that it was the intention of the legislature to provide means of redress for this class of cases, and not to duplicate the wrongdoer's liability, and subject him to two actions for a single injury. Previous statutes of a similar character having been

1. In *STATE v. MAINE CENTRAL R. R. Co.*, 60 Me. 490 (1872), fireman fatally injured in collision between steam cars, the question turned upon the construction of the statute (R. S., ch. 51, § 36), relating to recovery of damages, by indictment, for loss of life through carelessness of railroad companies. It was held that: "The remedy, by indictment, for the life of any person, in the exercise of due care and diligence, lost by the negligence or carelessness of any rail-

road corporation, or by that of its servants or agents while employed in its business, is limited to cases where the person injured dies immediately, and is not applicable in any case to the employees of the road." Demurrer sustained.

See, also, *STATE v. GRAND TRUNK RAILWAY*, 61 Me. 115 (1873), where the Death Statute was construed, as in 60 Me. 490 (preceding paragraph), and the ruling in the latter case followed.

so interpreted, we can not resist the conviction that the legislature expected and intended that this statute should receive the same interpretation. Our conclusion, therefore, is that the Act of 1891, c. 124, applies only to cases in which the persons injured die immediately.

We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. Instantaneous means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be instantaneous. It is so defined in Webster's International Dictionary. And when we say that the death must be immediate, we do not mean to say that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood-vessels, and causes the person injured to bleed to death, we think his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes, and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But, in stating legal propositions, it is impossible to be too exact; and while other courts, and some writers of text-books, have used indiscriminately the words instantaneous and immediate, and the adverbs instantaneously and immediately, we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words immediate and immediately, as being more comprehensive and elastic in their meaning, than the words instantaneous and instantaneously, and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death; but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death.

Read in the light of history,—that is, taking into account the then existing state of the law in this State, and the defects supposed to exist, and the presumed desire to remedy these defects, and not to change or alter the law in particulars where no change was needed,—our conclusion is that the statute of 1891, c. 124, entitled "An Act to give a right of action for injuries causing death," was intended by the legislature to

apply to cases where the persons injured die immediately. It not being averred in the plaintiff's declaration that her husband died immediately, but, on the contrary, it being therein averred that he survived about an hour, we think the declaration describes only a common-law right of action, in which the damages, if any are recovered, must be for the benefit of the decedent's estate generally, and not for the exclusive benefit of his widow; and that, in its amended form (declaring that the action was brought for the exclusive benefit of the widow of the deceased) it was demurrable, and that the demurrer was rightfully sustained. Consequently, the exceptions must be overruled. But, as stipulated in the bill of exceptions, the plaintiff may again amend her writ by restoring it to its original form, without the payment of costs, and the defendants may plead anew.

Exceptions overruled.

EMPLOYEE INJURED IN MINE—CONTRACTOR—FELLOW-SERVANT—EXPERT TESTIMONY.—In **MAYHEW v. SULLIVAN MINING COMPANY**, 76 Me. 100 (*April, 1884*), person injured while working in mine, defendant's exceptions on verdict returned for plaintiff for \$2,500 were overruled. The facts and the points decided are stated in the official syllabus to the case as follows:

"One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, is to be regarded as a contractor with and not a servant of the company. He is not a fellow-servant with the superintendent of the company under whose direction his work is performed.

"When there is a binding contract for the performance of a specific job by a contractor for a price agreed, it matters not, in determining the question whether he who has undertaken such job is to be regarded as the mere servant of the other party, what kind of work was the subject of the contract, or whether it was or not a portion of the regular work which the party contracting for it was carrying on.

"Where a ladder-hole is cut in a platform to a mine, while it is in active operation, by the direction of the superintendent, and one, who is employed in the mine, for want of a railing, or light, or want of warning, falls through the hole and is injured, the company operating the mine is liable for the damages sustained, whether the person so injured was a servant or contractor.

"The testimony of experts is rightly excluded when the subject of the inquiry is one which can be perfectly comprehended and rightly passed upon by the jury without the opinion of experts.

"The exclusion of testimony which raises collateral issues is in the discretion of the presiding judge, and is no ground for exception."

EMPLOYEE INJURED WHILE REPAIRING A DAM — FOREMAN OF CREW — FELLOW-SERVANTS — NON-SUIT. — In **DOUGHTY v. PENOBSCOT LOG DRIVING COMPANY**, 76 Me. 143 (*May, 1884*), the plaintiff was *nonsuited*, the decision being stated in the official syllabus as follows:

"Persons who are employed under the same master, derive authority and compensation from the same common source, and are engaged in the same general business, although one is a foreman of the work, and the other a common laborer, are fellow-servants; and take the risk of each other's negligence; the principal not being liable to the injured servant therefor.

"An exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it; the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master.

"A crew of men were engaged under a foreman or superintendent in repairing a dam for a log-driving company, incorporated by the laws of the State, when one of the laborers was injured by the carelessness of another who acted under the direction and immediate observation of the foreman in doing the particular act complained of. *Held*: That the foreman and laborers were fellow-servants within the rule exculpating the company from liability."

The declaration in the **DOUGHTY** case, *supra*, was as follows:

"In a plea of the case, for that the plaintiff, being in the employ of said defendant company, on the 13th day of March, A. D. 1882, as a laborer in the repair of a dam belonging to said company, at the foot of Chesuncook lake in the county of Piscataquis, and working upon said dam under the eye and direction of one Jasper Johnson, an employee of said defendant company, having the entire charge and control of such repairs, and the men thereon employed, to wit: fitting a wooden prop to hold one end of a plank that held the gate in position, and against which plank said gate was pressing towards said plaintiff by a great force, and while so employed by the direction of said Johnson, and in the use of ordinary care, and before said prop was completed and set as contemplated, and was necessary to support said plank, one Edward Lambert, also an employee of said defendant company, under the direction and control of said Johnson,

by the order of said Johnson and under his immediate eye, sawed off a pin which held the end of said plank, near the plaintiff, which plank so suddenly loosened, swung — said Johnson well knowing it would — with great force against the plaintiff, who was greatly hurt and injured, and by reason thereof has suffered great pain, has been unable to labor, and has been put to great expense in the care and surgical aid necessary to his recovery therefrom, and plaintiff avers that said hurt and injuries were the result of, and occasioned by the carelessness and negligence of said defendant company by their servants as aforesaid, and to the damage of said plaintiff (as he says) the sum of one thousand dollars, which shall then and there be made to appear with other due damage.”

To this declaration the defendant filed a general demurrer, which was joined, and the case was reported to the law court with the agreement that if the demurrer was sustained a nonsuit should be entered, otherwise the case was to stand for trial. *Plaintiff nonsuited.*

EMPLOYEE INJURED BY FALL OF STAGING — ACCIDENT — SCINTILLA OF EVIDENCE NOT SUFFICIENT TO SUBMIT CASE TO JURY — FELLOW-SERVANT — PLEADING. — In **ELWELL v. HACKER AND ANOTHER**, 86 Me. 416 (May, 1894), employee injured by the fall of a staging which he was taking down, plaintiff's exceptions to nonsuit were *overruled*. The Supreme Court (per FOSTER, J.) ruled as follows:

“To maintain an action against his employer for personal injuries, the servant must establish some neglect of duty on the part of the master arising out of the relation between them, which was the direct cause of the injury, and which the master was bound to guard against.

“Ordinarily the question of due care, and of negligence, is one of fact for the jury.

“But where the facts are undisputed, and there is no evidence, or the evidence is too slight or trifling to be considered by the jury, then it is the duty of the court to order a nonsuit.

“A case must not necessarily be submitted to the jury because there is a scintilla of evidence. There must be evidence having legal weight.

“If evidence is to be offered showing that the injury was received through the negligence of the master in selecting or employing incompetent fellow-servants, the declaration must contain such averment, otherwise the evidence is not admissible.”

After citing several authorities on the points decided the court said:

“Here, the plaintiff had built the staging himself from materials of his own selection. There is no evidence that these materials were unsuitable. On the contrary, the evidence seems to be conclusive

that they were suitable from the fact that the staging had done its work, and held up the brick and mortar of a great mill, and was being levelled to the ground at the time of the accident. There is no evidence that the defendants, or either of them, personally superintended the removal of the staging. The plaintiff had built it and worked for months upon it. He knew how it was constructed, and how it was to be taken down, for he had himself taken down more than three-fourths of it around the mill, and was removing the balance. It might well be supposed that by that time he knew something about the work he was doing and understood and appreciated the dangers incident to it. The very platform upon which he was standing when he fell had just before been lowered by him from the story above, and was about to be lowered again. He had been instructed by one of the defendants how to remove the staging. They were not obliged to see that no accident happened to the plaintiff. He assumed the ordinary risks incident to the work in which he was engaged, including the negligence of fellow-servants. This principle is too well settled to require the citation of authorities.

"But it is claimed there was a defect in the staging; that one of the stays extending through a window and fastened to the floor had been loosened or unfastened from the floor, which allowed the stage to spread and precipitate the plaintiff, with the plank upon which he was standing, to the ground. There is no evidence, however, that the defendants were in any way responsible for the unfastening of the stay. The only evidence bearing upon this, and that is very meagre, goes to show that if loosened by anyone it was done by one of the masons at work on the inside of the building, and he was a fellow-servant.

"There is no evidence that any fellow-servant of the plaintiff was incompetent, or negligently selected or employed by the defendants. Nor would such evidence be admissible from the fact that the declaration contains no such averment. Such negligence, if relied on in support of the plaintiff's claim, must be averred in the declaration, and established by proof. *Dunham v. Rackliff*, 71 Me. 345, 349; *Blake v. Me. Cent. R. R.*, 70 Me. 60; *Lawler v. Androscoggin R. R.*, 62 Me. 463.

"The case appears to be one where an accident has happened to the plaintiff, but for which no one is responsible in law. See *Kelley v. Norcross*, 121 Mass. 508. Exceptions overruled."

GOVERNMENT EMPLOYEE INJURED BY FALL OF DERRICK—NEGLIGENCE OF FELLOW-SERVANT—LIABILITY OF ONE EMPLOYEE TO ANOTHER.—In **ATKINS v. FIELD**, 89 Me. 281 (*June, 1896*), verdict for plaintiff for \$3.100 was sustained, and defendant's exceptions and motion for

new trial overruled. Plaintiff and defendant were in the employ of the United States government and engaged in the construction of fortification work, the former as a laborer and the latter as immediate and general overseer. A large derrick was used in the work, which was rigged and set up under defendant's supervision. While at work under defendant's direction, plaintiff was injured by the fall of the derrick. The defense alleged the fellow-servant doctrine, the parties being in the employ of the same common master. It was held that "an employee is responsible to a co-employee for injuries caused by his negligence in the line of his duty to the common employer. When the common employer approves the conduct of an employee without directing it, that does not free the latter from his responsibility to a co-employee, if he was in fact negligent. When an employee personally selects the means and directs the mode of setting up apparatus furnished by the common employer he becomes personally responsible to co-employees for injuries caused by his negligence in so doing, and the fact that the work was satisfactory to the common employer, does not excuse the employee from the consequences of his negligence to others. The foregoing rule does not apply where the common employer or his agent directs and controls the means and modes of setting up the apparatus. There is responsibility only where there is freedom of action."

EMPLOYEES INJURED BY BLASTING OPERATIONS —
In **HARE v. McINTIRE**, 82 Me. 240 (*January, 1890*), where plaintiff, a stonecutter in a granite quarry, was injured by a rock thrown from a blast discharged by defendant, a fellow-workman, plaintiff was nonsuited. The particular complaint was that no notice was given to plaintiff previous to the firing of the blast, but the Supreme Court thought that plaintiff mistook his form of remedy, and that the real fault of the defendant was not in failing to give sufficient notice, but in not sufficiently covering the blast. There being no such claim in the declaration, evidence thereof was properly excluded. *Held*, action not maintainable. It was also held that "the remedy provided by R. S. c. 17, sections 23 and 24, for the recovery of damages for personal injury caused by the blasting of rock, does not apply to workmen in a quarry." It was also held that "fellow-servants mutually owe to each other the duty of exercising ordinary care in the performance of their service, and which ever fails in that respect is liable at common law for any personal injury resulting therefrom to his fellow-servant."

In **HAGGERTY, ADM'X v. HALLOWELL GRANITE CO.**, 89 Me. 118 (*April, 1896*), verdict for plaintiff for \$500 was sustained, and defendant's motion for new trial overruled. The action was brought

under chapter 124 of the statute of 1891, to recover damages for the death of plaintiff's intestate, a quarryman in defendant's employ, who while at work as one of a crew of men in removing stone which had been blasted, was struck and killed by the fall of a detached rock, weighing about 800 pounds.

BRAKEMAN KILLED BY CONTACT WITH SKIDWAY — KNOWLEDGE OF DANGER — CONTRIBUTORY NEGLIGENCE.— In **WALKER, ADM'R v. REDINGTON LUMBER CO.**, 86 Me. 191 (*December, 1893*), the case is stated by HASKELL, J., as follows: "A brakeman was last seen alive leaning from the steps of the forward end of a passenger car on the Phillips and Rangeley Railroad, looking backward and under the car, while the train was moving on a down grade. He set his brake, stepped down on the steps, and, holding on by the guard-rails, leaned over, looking backward and under the car, evidently to observe whether the wheels were sliding. He returned to the brake, set it up, and then resumed his place of observation. The car passed a skidway about level with its floor and at least twenty-nine inches distant from it. The skidway had been used by the defendant previously in loading logs upon platform cars. Presumably some part of the brakeman's body struck the skidway that brushed him aside, and, hanging on for his life, he was carried a short distance, and then fell under the car and was killed. Assuming all other facts necessary to charge the defendant to be proved, what excuse can be given for the carelessness of the deceased? He had been passing daily by a lumber landing as far away from the sides of the cars as all ordinary platforms are, although passenger platforms, in these days, are much lower on standard gauge roads than the floors of the cars. It was no part of his duty to lean from the car to observe the effect of his brake upon the wheels. He could ordinarily tell from his post at the brake rod when the wheels began to slide. It was the sixth of October. There could not have been snow or ice upon the rail so as to have made it more difficult to tell how well the brake was holding. He carelessly exposed himself to danger, of which he must have previously had notice, and, although his misfortune was great, others cannot be held to share it with him or bear it for him. Plaintiff nonsuited."

DANGEROUS PASSAGEWAY ON WHARF — PERSON INJURED WHILE CARRYING TRUNK TO VESSEL — AGENTS OF OWNER OF WHARF LIABLE.— In **CAMPBELL v. PORTLAND SUGAR COMPANY et al.**, 62 Me. 552 (*1873*), the facts and points decided are sufficiently stated in the official syllabus (the opinion being rendered by BARROWS, J.) as follows:

"The plaintiff, a driver of a job wagon, was employed by a sea-

man to take a chest on board of a vessel lying at a wharf owned by the Portland Sugar Company, whose general agents were the firm of J. B. Brown & Sons, the other defendants. Portions of the wharf, and among them the place where the plaintiff was injured, had been let by them to a mercantile house some months previously by a verbal agreement, and were used by the tenants for the storing of merchandise, principally lumber and cooperage stock, and for the loading and unloading of vessels, many of which were dispatched from the wharf, and among them the brig to which the plaintiff was going with the chest. The way from the business streets of the city down the wharf, as far as the sheds near the foot of it, was open and much frequented. To reach vessels lying where the brig was it was necessary, on account of piles of lumber, etc., to go through the shed, the doors of which, on the wharf side, had been removed, and on the water side were kept open during business hours, thus affording free passage for all who had business with the vessels lying there. Mariners' chests were always carried through there to vessels lying at that part of the wharf. The plaintiff, with the chest on his shoulder, after passing through the shed, when near the gangway of the brig, stepped into an old hole, worn through the covering of the wharf, which had been there a long time, and received severe injuries. As between the merchants who hired this part of the wharf and the defendants, it was specially agreed that the defendants should do all the needful repairs, and their wharfinger spent most of his time on the wharf, and occasionally made repairs on the parts thus let. Upon this state of facts, it was *held*, that the plaintiff could not be regarded as a mere licensee; that all persons who were induced to go upon the wharf for the transaction of business, or the performance of work connected with the purposes for which the wharf was used and rented, might hold the owners responsible for negligence in the construction and maintenance of the wharf, as for the breach of a duty; that the liability of the owners would be the same with respect to one going on business to a vessel lying at a part of the wharf which was thus rented, as with respect to one going on those portions of it more immediately in the owners' possession, and under their control; that it made no difference, under the circumstances above stated, whether the passage through the shed was held out to the plaintiff by the owners of their tenants, inasmuch as the tenants were making no use of the property except what the varying exigencies of the business for which the property was held might require; that so long as the owners leased the property for such purposes they were bound to strict care to make it safe and free from pitfalls and traps; that the corporation was responsible for the negligence of its agents, on the principle, *respondeat superior*; that the agents were responsible as for personal negligence; that the action

cannot be maintained against the corporation which owned the wharf, and their agents jointly, though both are responsible in several suits; that a verdict having been rendered against both upon the refusal of the presiding judge to rule that the action could not be maintained against the owner and agents jointly, it is necessary before the exceptions can be overruled that the plaintiff should enter a discontinuance at *Nisi Prius* against the owners of the wharf or the agents; that in the present case, by reason of certain testimony admitted, he must discontinue against the owners; that when such discontinuance is entered the ground of that exception would be removed, and that a new trial would not be granted on that account; that the case reported does not disclose such evidence of a want of due and ordinary care on the part of the plaintiff, as will preclude him from recovering; nor can the court say under all the circumstances that the damages are excessive."

Plaintiff recovered a verdict in the Superior Court of Cumberland county for \$9,500 (a former trial resulting in verdict for \$8,166), to which defendants excepted and moved for new trial. The Supreme Court, however, overruled the motion and exceptions (on plaintiff discontinuing the action against the Portland Sugar Company), and judgment was affirmed. [See rulings in the CAMPBELL case set out in the preceding paragraph.]

NOTES OF MAINE CASES INVOLVING THE RELATIONSHIP OF MASTER AND SERVANT.

Liability of master for act of teamster in running over a child.

In *O'BRIEN v. MCGLINCHY*, 68 Me. 552 (December, 1878), exceptions and motions from Cumberland Superior Court on case by an infant three and a half years of age, by his father and next friend, for negligence of defendant's teamster in running over the plaintiff with a horse and wagon, new trial was granted on newly-discovered evidence. The question of contributory negligence is stated in the official syllabus as follows:

"It is a question of fact, and not of law, whether it be negligence on the part of parents to permit their child three and a half years old to be upon a public street unattended.

"In an action by a child, *non sui juris*, for an injury caused by being run over upon a public street, it is immaterial that its parents negligently permitted it to be upon the street, provided the child at the time exercised for its safety that amount of care which the law would require of persons generally.

"While it is generally a defense to an action of tort that the plaintiff's negligence contributed to produce the injury, still, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could be avoided by the use of ordinary care at the time by the defendant.

ants; and there is no evidence tending to show that the defendants did not exercise ordinary care in the selection of such servant. Under such circumstances, it is now the well-established common law of England that a workman who meets with an injury from the negligence of a fellow-workman can not recover therefor in an action against the common master. The superior does not warrant the competency of his servants, and can not be held answerable for their neglects to another servant, if he used proper care in their selection. *Tarrant v. Webb*, recently decided in the English Court of Common Pleas [18 C. B. 797], and cited in the American Law Reg., vol. 5, p. 306; *Hutchinson v. York, Newcastle & Berwick R. R. Co.*, 5 W. H. & G. 343; *Wigmore v. Jay*, 5 W. H. & G. 354 (1).

The same doctrine has also been held in New York, *Brown v. Maxwell*, 6 Hill, 592; *Coon v. Syracuse & Utica R. R. Co.*, 6 Barb. 231. So it has been held, in several cases in Massachusetts, that where the relation existing between the parties was

1. In *TARRANT v. WEBB*, 18 C. B. 797, it was held that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. It was also held that the master is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant is incompetent, but whether the master did not exercise due care in employing him.

In *Hutchinson v. York, Newcastle & Berwick R'y Co.*, 5 W. H. & G. (Exch.) 343, where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants, it was held that no action was maintainable by his personal representative against the com-

pany, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

In *Wigmore v. Jay*, 5 Exch. 354 (Exch. of Pleas, 1850), it appeared that defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. *Held*, that no action could be maintained against the defendant under the 9 and 10 Vict. c. 93. there being no evidence that the foreman was an improper person to employ for that purpose.

that of master and servant, no action could be maintained against the master for an injury received in the course of that service from the negligence of a fellow-servant. *Farwell v. Boston & Worcester R. Corp.*, 4 Met. 49; *Hayes v. Western R. Corp.*, 3 Cush. 270; *King v. Boston & Worcester R. Corp.*, 9 Cush. 112 (1).

In the present case, although the duties of the servant through whose fault the injury is said to have occurred, were in some respects different from those of the plaintiff, still, at the time of the injury, the plaintiff seems to have been employed with his fellow-servant in the accomplishment of the same common enterprise, the duties of each being directed to the same end; but if it were otherwise, the rule of law would be the same. *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. 228; *Albro v. Agawam Canal Co.*, 6 Cush. 75 (2).

It is, however, contended that the common law upon this subject has been modified or changed by our R. S., chap. 81, § 21, so far as relates to railroad corporations; and that their liabilities in cases like the present have been enlarged. By that statute it is provided that "every railroad corporation shall be liable for all damages sustained by *any person* in consequence of any neglect of the provisions of the foregoing section, or of *any other neglect of any of their servants, or by any mismanagement of their engines*, in an action on the case, by the person sustaining such damages." The general purpose of this statute seems to be to fix and establish the rights and obligations of railroad corporations as between themselves and third persons, not their servants; and the language relied on in the section cited, has reference to the liabilities of such corporations for the neglects of their agents, or servants. Notwithstanding its literal construction might entitle a negligent servant to recover for injuries sustained, through his own fault, or any servant to recover for injuries occasioned by the fault of a fellow-servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law. Considering the general design of this statute, we are of opinion that it was not the intention of the legislature to change the nature of, or the incidents connected with, any contracts between such corporations and their servants. If such had

1. Reported with the *Massachusetts* cases in this volume, *post*.

2. Reported with the *Massachusetts* cases in this volume, *post*.

been the intention, we think it would have been more plainly or directly expressed. The words, *any person*, in that section of the statute relied on, must be limited in their application to such persons as were not the servants of the corporation, and who may have sustained damages without any contributing fault on their part; thus leaving such servants, who are presumed to have arranged their compensation with their eyes open, and to have assumed the relation with all its ordinary dangers and risks, without any remedy against the corporation for such injuries as may be incident to the service they have engaged to perform. The servant assumes the risks and perils which are incident to his service, "and as between himself and his master is supposed to have contracted on those terms." *Noyes v. Smith et al.*, 2 William's Reports of cases decided in the Supreme Court of Vermont, as published in the Amer. Law. Reg., vol. 5, p. 615 (28 Vt. 59). Most of the cases before cited distinctly recognize and approve this principle, and some of them assert that the ordinary risks and perils assumed include those arising from the negligence of other fellow-servants. Such a rule is supposed to induce greater caution on the part of servants and thus to conduce to the general safety, and the public good, and we are satisfied with the reasons, the justice, and the policy upon which it rests. The result is that upon the evidence contained in the report of this case the nonsuit must stand.

LAWLER v. ANDROSCOGGIN RAILROAD CO.

Supreme Judicial Court, Maine, (Western District), 1873.

[Reported in 62 Me. 463.]

FELLOW-SERVANT.—The rule that a servant, who is injured by the negligence or misconduct of his fellow-servant, cannot maintain an action against his master for such injury, is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey.

SAFE APPLIANCES AND PLACE TO WORK.—The master of men employed in dangerous occupations is bound to provide for their safety, and this obligation extends alike to the providing of good and sufficient machinery, and to the procuring skilled and judicious workmen by whom it is to be controlled.

PLEADING—NEGLIGENCE.—When the servant injured seeks to hold the master for negligence in failing to procure suitable and proper servants, by whose incompetency the injury was caused, the charge of negligence should be distinctly set forth in an appropriate count.

(*Official syllabus.*)

ON EXCEPTIONS. *Overruled.*

This was an action on the case for injuries received while employed by the defendant corporation in repairing its track-bed under the supervision of its roadmaster. The defendants filed a demurrer, which was sustained, and the plaintiff excepted. The declaration was as follows:

"For that the said defendants, at Lewiston, on the third day of January, A. D. 1870, were the owners of a certain railroad running through the city of Lewiston and then out of repair at a certain point in said city of Lewiston, by reason of the washing out of a culvert upon the line of said road, whereby an excavation had been made under the bank upon one side of the said culvert, leaving the top of said bank, consisting of a large mass of stone, gravel and frozen earth, overhanging said excavation, and rendering it very dangerous and perilous to laborers making repairs therein; and the plaintiff, being then and there a laborer employed upon said road, and to assist in repairing the culvert aforesaid, being ignorant of the dangerous condition of said embankment, and in the exercise of due care and diligence, then and there went into the said excavation for the purpose of repairing the said culvert at the request and direction of one Wagg, the roadmaster upon said road, he, the said Wagg, as well as the superintendent upon said road, to wit, one Brown, well knowing the dangerous condition of the embankment aforesaid; yet, nevertheless and notwithstanding the premises aforesaid, the said railroad company, acting by their agent and roadmaster aforesaid, then and there did wantonly and wilfully permit, request, order and direct the plaintiff to go into said excavation and to work therein; and the plaintiff being and working therein at their request as aforesaid, the said company, by their agent and roadmaster aforesaid, did so carelessly and negligently manage and conduct, supervise and control the making of said repairs upon said culvert, that the said overhanging bank, consisting of a large mass of stone, gravel and frozen earth, then and there broke off from the main embankment and fell into the said excavation where the plaintiff was working as aforesaid, falling upon the plaintiff and throwing him with much violence against a large stick of timber there lying, breaking both of the plaintiff's legs, crushing, bruising and otherwise injuring the plaintiff, so that he is, by reason of said breaking, crushing, bruising and other injuries, then and there sustained, wholly disabled for the remainder of his life, and hath been put to great pain, suffering and expense."

BRADBURY & BRADBURY and RECORD & HUTCHINSON, for plaintiff.

FRYE, COTTON & WHITE, for defendants.

Appleton, Ch. J.—It is well settled in this State that a servant who is injured by the negligence or misconduct of his fellow-servant cannot maintain an action against his master for such injury. *Carle v. B. & P. C. & R. R. Co.*, 43 Me. 269; *Beaulieu v. Portland Co.*, 48 Me. 291 (1). "The rule," observes Earle, Ch. J., in *Tunney v. Midland R'y Co.*, L. R., 1 C. B. 291, "has been settled by a series of decisions beginning with *Priestley v. Fowler*, 3 M. & W. 1, and ending with *Morgan v. Vale of Neath R'y*, L. R., 1 Q. B. 148, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the negligence of his fellow-servants." This is pretty universally recognized as law in the decisions of the courts of the different States in this country (2).

Nor is the law held differently when the employee causing the injury is engaged in a different department of the same general service or exercising a higher grade of authority. In *Feltham v. England*, L. R., 2 Q. B. 33, it was argued that the foreman, by whose negligence the injury occurred, should be deemed as the "*alter ego*" of the master and not as the fellow-servant of the party injured, but the court held otherwise. "We think," remarks Mellor, J., "that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority. As was said by Willes, J., in *Gallagher v. Piper*, 33 L. J. C. P. 335, 'a foreman is a servant as much as the other servants whose work he superintends.'" This was held to be the law of this State in *Beaulieu v. Portland Co.*, 48 Me. 295, 15 Am. Neg. Cas. 253, *ante*, and in Massachusetts, in *Gilshannon v. Stony Brook R. R.*, 10 Cush. 228 (3); and in Vermont, in *Hard v. Vt. Cent. R. Co.*, 32 Vt. 473.

1. See these cases reported with the *Maine* cases in this volume of Am. Neg. Cas., pages 305, and 253, *ante*.
 2. The English cases cited are sufficiently stated in the opinion in the case at bar.
 3. Reported with the *Massachusetts* cases in this volume, p. 413, *post*.

2. The English cases cited are suffi-

The master is liable for the consequences of negligence in the selection of his servants. The gist of the action is negligence. It is the duty of the master to select fit and competent servants. Negligence exists when the master fails to do his best to accomplish this. *Gilman v. Eastern R. R.*, 10 Allen, 238 (1); *Warner v. Erie R. Co.*, 39 N. Y. 468. Where the servant attempts to hold the master for his negligence in procuring suitable servants, the charge of negligence should be duly alleged in an appropriate count. *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567; *Moss v. Pac. R. Co.*, 49 Mo. 167.

The master of men in dangerous occupations is bound to provide for their safety, and this obligation extends equally to the providing good and sufficient machinery and to the procuring skilled and judicious men by whom it is to be controlled. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 (2); *Fitch v. Allen*, 98 Mass. 573. When a master employs a servant on a work of a dangerous character, he is bound to all reasonable precautions for the safety of his workmen. *Patterson v. Wallace*, 1 Macq. 757. And that they be not exposed to unreasonable risks. *Noyes v. Smith*, 28 Vt. 29. But the negligence of a fellow-servant is regarded as an ordinary risk. *Brydon v. Stewart*, 2 Macq. 30.

The declaration alleges that a culvert being out of repair and in a dangerous condition, and the plaintiff being employed to repair the same, he, being ignorant of its dangerous condition, of which the defendants, or their servants, were well aware, the defendants "by their agent and roadmaster did so carelessly and negligently manage and conduct, supervise and control the making of said repair upon said culvert," that the plaintiff was grievously injured. The careless and negligent management of the defendants' servants is the only cause of the injury set forth. There is no allegation of negligence on the part of the defendants in selecting incompetent servants, nor is it alleged that the dangerous condition of the culvert was the cause of the injury.

Exceptions overruled.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

1. Reported with the Massachusetts cases in this volume, p. 426, *post*.

2. See the *Coombs* cases, reported with the Massachusetts cases in this volume, page 506, *post*.

BRAKEMAN INJURED COUPLING CARS — FELLOW-SERVANT — EVIDENCE — NEW TRIAL. — In **CORSON v. MAINE CENTRAL R. R. CO.**, 76 Me. 244 (*June, 1884*), where plaintiff, a brakeman in defendant's employ, in attempting to couple an engine and tender to a train of freight cars, and in order to adjust the couplings, stepped between the buffer of the tender and the freight train, and the latter moved down upon him and jammed him against the buffer and injured him, verdict returned for plaintiff for \$400 was set aside and new trial granted, the official syllabus to the case stating the ruling as follows:

"In an action for personal injuries alleged to have been caused by the negligence of the employer in retaining the services of a fellow-servant who was careless, and whose carelessness caused the injury, a witness testified that he considered the fellow-servant slow and lazy, and not fit for the service, he was so slow, and witness had so informed the agent of the employer; and in answer to a question, if the fellow-servant was competent and careful in the performance of his duties, witness testified: 'Yes, he was always careful about his work.' *Held*, that this evidence was not sufficient to establish the negligence of the employer.

"The jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad, on account of what they saw or supposed they saw, or could read in his face and manner while testifying before them as a witness, and determine from that, alone, that the railroad company was negligent in employing such a person."

BRAKEMAN INJURED — DEFECTIVE BOX-CAR — EVIDENCE — PROOF — CASE FOR JURY. — In **GUTHRIE (by Next Friend) v. MAINE CENTRAL R. R. CO.**, 81 Me. 572 (*June, 1889*), action by a brakeman for personal injuries received at a railroad station while shackling a broken box-car unfit for use and dangerous to handle, on which the draw-bar had been torn away and the bumpers smashed and broken, it was *held* that the plaintiff's testimony justified the action standing for trial.

The Supreme Court in its opinion (per DANFORTH, J.) stated the case as follows:

"It appears that a freight train stood upon the track of the defendants' railroad, at the station in Bangor, ready to be started for Waterville. To this train was attached a freight car from the rear end of which the bumpers and draw-bar had been broken. Such was the grade out of the station toward Waterville, that it was necessary to render some extra assistance to start this train upon its way. In order to do this another train, consisting of an engine and about eight cars, upon which the plaintiff was a brakeman, was

backed toward the Waterville train with a view of coupling to it and pushing it over the grade. On approaching Waterville, the conductor of the assisting train ordered the plaintiff, who was on the top and about midway of it, to 'run ahead and make the hitch.' The plaintiff started in obedience to the order, but before its execution was accomplished the accident happened and he became unconscious. As there is no witness who saw him at the time we have no direct testimony as to the manner in which the injury occurred."

* * *

After discussing the questions whether there was sufficient proof of defendant's negligence, and of plaintiff's due care in performing his duties, the court said:

"It is contended that the plaintiff, on the authority of *Nason v. West*, 78 Me. 256, 15 Am. Neg. Cas. 273, *ante*, should be held to prove that the company had notice of the defect in the car. But *Nason v. West*, *supra*, in that respect, is not applicable. In that case the accident occurred by the falling in of an oven. But it did not appear that it was from any defect for which the defendant was responsible, or which imputed in any degree any fault in him, but the opposite.

"This principle of law is by no means a new one, nor is it alone applicable to railway companies. In all cases where a wrong, a fault, or an omission of a duty even, is proved, from which damages result, the wrong, fault, or omission, implies a neglect, in the absence of other evidence, which requires explanation, from the apparently guilty party. Action to stand for trial."

BRAKEMAN INJURED — DEFECTIVE CAR — NEW TRIAL. — In **ROBERTS v. BOSTON & MAINE R. R. CO.**, 88 Me. 260 (*January, 1896*), brakeman injured while attending to coupling-pin of box-car, he being caught between tender of locomotive and the box-car, and his hip dislocated, verdict for plaintiff for \$4,863.78 was set aside and new trial granted, the facts being stated in the official syllabus to the case as follows: "The plaintiff, while in the performance of his duty as brakeman, descended from the top of a box-car over the end next to the tender, with face towards the car, and tried to pull the coupling-pin, with his feet on the lower round of the ladder, and his right hand on the second or third round, but the pin would not come out, either on account of a crook in it, or the strain upon it; he took hold of it and turning it half way round pulled it out and laid it down upon the deadwood; the engine had begun to move toward the siding and was in motion when he pulled the pin. He swung round in a position to go up the ladder, and while in a sitting posture was caught and jammed against the car by the tender, and his hip was dislocated. *Held*, that the evidence was so preponderating in favor of the defendant, not only in respect to

the soundness of the car, but also in respect to the reasonable performance of duty on the part of the defendant in furnishing reasonably safe and proper appliances, that the jury were not justified in rendering a verdict for the plaintiff." See also former appeal, *Roberts v. Boston & Maine R. R.*, 83 Me. 298, where verdict for plaintiff was set aside.

YARD BRAKEMAN INJURED — DEFECTIVE CAR — KNOWLEDGE OF DANGER — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE. — In **JUDKINS v. MAINE CENTRAL R. R. CO.**, 80 Me. 417 (*June, 1888*), yard brakeman injured by falling from alleged defective freight car, verdict for plaintiff for \$2,733.33 was set aside and new trial granted, the rulings being stated in the official syllabus to the case as follows:

"It is not necessarily negligence on the part of a railroad company, as between the company and a brakeman on duty in its yard, that a freight car is found in use on its road in such a damaged and crippled condition that it exposes the employee to more than the common risk and danger which is incurred in handling ordinary cars. It is unavoidable that damaged cars must at times and places be handled by railroad employees.

"A proper management of a railroad may require that reasonable rules and regulations be adopted and published, in order that employees may be apprised of any unusual danger which they may be subjected to in handling damaged cars.

"If there be danger in handling a crippled car, which an experienced brakeman can appreciate for himself, the defective condition of the car being known to him, and he voluntarily assumes the risk of managing it in a manner which exposes him to unusual danger, when the emergencies are not so extreme as to require the service of him, he cannot recover of the company, if injured while so engaged.

"A yard brakeman cannot recover against a railroad company for an injury received in falling from a flat freight car, loaded with coal, while attempting to stop the car from running down a side-track, and possibly off at the end of it, by jumping upon the brake-beam in the front of and under the car, and pressing it down with his feet, holding himself to the car with one hand and pulling up the brake-chain with the other, the excuse for his act being that the brake-staff was so bent that it could not be effectively used in the ordinary manner; there being no rule of the company nor any order from any officer requiring such an undertaking by him."

NUGENT v. BOSTON, CONCORD & MONTREAL RAILROAD.

Supreme Judicial Court, Maine, January, 1888.

[Reported in 80 Me. 62.]

DEFECTIVE STATION HOUSE—BRAKEMAN OF ANOTHER RAILROAD INJURED—CONTRIBUTORY NEGLIGENCE.—On the trial of an action on the case against a railroad corporation for a personal injury resulting from the alleged defective construction of the defendant's station-house, the question of contributory negligence, though depending upon undisputed facts, is properly submitted to the jury, when intelligent, fair-minded persons may reasonably arrive at different conclusions thereon.

LEASED RAILROAD TRACK—LIABILITY OF LESSOR.—A railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station-house.

SAME—When a railroad corporation leases its road and appurtenances by virtue of a legislative enactment containing no provision whatever exempting it from liability, the lessor is liable to one lawfully there, for a personal injury which resulted solely from the original defective construction of its station-house, though the lessee had long been in full possession and control under the lease, and had covenanted therein to maintain, preserve and keep the station-houses in as good order and repair as the same were in at the date of the lease.

BRAKEMAN COMING IN CONTACT WITH STATION AWNING—EVIDENCE.—In an action by a brakeman for an injury received while ascending the side ladder on a box-car, which resulted from the proximity of the station awning to the car, testimony that no other awning on the road was like this one is admissible.

EVIDENCE.—In such an action the admission of testimony by an experienced brakeman on the same train that the ladders were so variously constructed that the undivided attention of a person ascending them was required, affords no ground of exception to the defendant.

(Official syllabus.)

ON EXCEPTIONS AND MOTION TO SET ASIDE THE VERDICT for plaintiff for \$3,100 in the Superior Court, Cumberland county. The case is stated in the opinion. *Motion and exceptions overruled.*

WILBUR F. LUNT and JOSEPH W. SPAULDING, for plaintiff.

A. A. STROUT, for defendant.

Virgin, J.—By a contract of March 1, 1884, the Portland & Ogdensburg Railroad Company, for certain valuable considera-

tions therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station, the defendant "assuming all liability and risk of accident arising from defect of roadbed or track or default of its employees or servants."

On June 19, 1884, while the permit was in full force, the Boston & Lowell Railroad Company leased for ninety-nine years the defendant's railroad, stations, etc., agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever."

The plaintiff was rear brakeman on a Portland & Ogdensburgh special freight train bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box-car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car and eighteen inches therefrom, and he was thereby knocked off between the cars, and before he could extricate himself, his right arm was so crushed by the wheels of the saloon car that amputation became necessary.

The jury, after a charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for \$3,100. Under the instructions, the jury must have found, 1, that the awning was negligently constructed on account of its proximity to the passing car; 2, that the injury was caused solely thereby; and, 3, that the plaintiff was in the exercise of ordinary care at the time of the injury.

It is contended that the plaintiff was guilty of contributory negligence; and that as the facts in relation thereto were undisputed, the question was one of law and should, therefore, have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties in actions of this nature have been decided by the court on undisputed facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Lessan v. Me. Cent. R.*

Co., 77 Me. 85, 91, 11 Am. Neg. Cas. 657*n*; Shannon *v.* Boston & Albany R. Co., 78 Me. 52, 60, 3 Am. Neg. Cas. 585; Snow *v.* Housatonic R. Co., 8 Allen, 441; Treat *v.* Boston & L. R. Co., 131 Mass. 371, 3 Am. Neg. Cas. 799; Peverly *v.* Boston, 136 Mass. 366, 3 Am. Neg. Cas. 805; Lawless *v.* Conn. River R. Co., 136 Mass. 1; R. R. Co. *v.* Stout, 17 Wall. 657, 663, 664.

As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for twenty years, and as conductor and brakeman passed the station once or twice daily for seven years. Just as his train started up, he caught hold of the side ladder of a passing car, and, without any call of duty there, as he climbed toward the top, was struck and killed by the roof of the depot which projected over and within thirty-four inches of the car; and the court was divided on the questions of negligence involved. Gibson *v.* Erie R'y Co., 63 N. Y. 449. So, in another case, where a brakeman (the plaintiff), who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and on signal for brakes, ran up the side ladder of a car and was struck, knocked off and lost his arm, by the awning which projected within eighteen inches of the car; the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of \$10,000 as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among the station-houses whose roof or awning so projects over the line of the road, that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." Ill. Cent. R. Co. *v.* Welch, 52 Ill. 183, 14 Am. Neg. Cas. 356*n*.

We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occa-

sion to notice it in passing. When the accident happened, the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it, his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a down grade of thirty feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was "by no means decisive. The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or be prepared at all times to avoid it." *Snow v. Housatonic R. Co.*, 8 Allen, 441, 450 (1).

But while this rule may not be seriously questioned as between a railroad company and its own employees, the defendant challenges its application as between it and the plaintiff. This presents the question, whether a railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakemen, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. We are of opinion that it is.

In such a case the only materiality which attaches to the

1. The *Snow* case is reported with the Massachusetts cases in this volume, page 417, *post*.

contract between the companies, is to make certain that the plaintiff was lawfully and not a trespasser on the defendant's road. And although the defendant, in its contract with the Portland & Ogdensburg Railroad Company, in express terms, "assumed all liability and risk of accident arising from defect of roadbed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. *Tobin v. Portland S. & P. R. Co.*, 59 Me. 183, 9 Am. Neg. Cas. 411. It is common learning that as a compensation for the grant of its corporate franchise intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public independent of contract and co-extensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition. *Thomas v. R. R. Co.*, 101 U. S. 71, 83; *Bean v. At. & St. L. R. Co.*, 63 Me. 293, 295. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto*, for an injury caused by a neglect of a duty created by law. Broom's Comm. (4 ed.) 675-676, and cases. And for the neglect of such a duty privity is not essential to the maintenance of an action of tort therefor. *Campbell v. Portland S. Co.*, 62 Me. 552, 564, 15 Am. Neg. Cas. 301, *ante*; Broom's Comm. 673 *et seq.*

This principle is variously illustrated by the numerous cases cited in Broom's Comm. 655-670. Thus a railroad company is liable for the loss of a passenger's luggage whose fare was paid by another, not on account of a breach of contract, but of legal duty. *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655 (1).

So, where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and the retailer sold a pint thereof to the plaintiff

1. In *Marshall v. York, Newcastle and Berwick R'y Co.*, 11 C. B. 655, the declaration against a railway company for the loss of a passenger's luggage stated that the company received the passenger, to be safely carried, together with his luggage. "for reward to the company payable;" and that it was their duty safely and securely to carry him and his luggage; and

averred a breach of that duty, whereby his luggage was lost: *Held*, that the action being founded on the breach of duty and not of contract, it was not necessary to allege or to prove that the reward was to be paid by the plaintiff, but that he was entitled to recover, although it appeared that the fare was paid by his master, with whom he was traveling at the time.

to be used in a lamp and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff." *Wellington v. Downer K. Oil Co.*, 104 Mass. 64 67 (1).

So, where a chemist compounded a hair-wash and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury, on the ground of the defendant's breach of duty. *George v. Skinnington, L. R.*, 5. Exch. 1.

In like manner, "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance toward him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance towards every one traveling on the road. So, if a mason contracts to erect a bridge or other work over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract. *Longmeid v. Holliday*, 6 Eng. L. & Eq. 563.

So, where a station being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding—a motion to set aside a verdict for the plaintiff was overruled. *Vose v. Lanc. & Y. R'y Co.*, 2 H. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or if a surgeon unskillfully treat him to his injury, is liable to the patient, even when a father or friend of the patient was the contractor. *Pippin v. Sheppard*, 11 Price, 40; *Gladwell v. Steggall*, 5 Bing. (N. C.) 733 (2); *Thomas v. Winchester*, 2 Seld. 397.

1. See the *Massachusetts* cases reported in this volume, *post*. of *George v. Skinnington, L. R.*, 5 Exch. 1, *Longmeid v. Holliday*, 6 Eng. L. & Eq. 563, *Vose v. Lanc. & Y. R'y Co.*, 2 H. & N. 728; *Pippin v.*

2. The rulings in the English cases

The principle is sustained in the well-considered case of *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 370, which was re-examined and re-affirmed by the same learned court in *Merrill v. Central Vt. R. Co.*, 54 Vt. 200; also in *Smith v. N. Y. & H. R. Co.*, 19 N. Y., 127; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Pierce Railroads*, 274; *Patt. R'y Acc.*, § 228; 2 *Wood Railw. L.* 1338-1339, and notes.

We are aware that this view is not in accordance with *Murch v. Concord R. Co.*, 29 N. H. 35, 9 Am. Neg. Cas. 551, and *Pierce v. Concord R. Co.*, 51 N. H. 593, which cases were cited by a divided court in this State on another point (*Mahoney v. At. & St. L. R. Co.*, 63 Me. 72); but notwithstanding our high opinion of the learned court which pronounced those opinions, we think the views herein declared are more satisfactory.

Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O. to pass and repass by the Bethlehem station-house of the defendant which, therefore, owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care; and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the Boston & Lowell Railroad Company constitutes a defense.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the State, by leasing its road and appurtenances to another. *York & M. L. R. Co. v. Winans*, 17 How. 30; *Thomas v. R. R. Co.*, 101 U. S. 71, 83.

Assuming the lease of the defendant road, station-houses, etc., to the Boston and Lowell company to have been duly authorized by the respective legislatures of the States which granted their charters, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management and control, was the defendant thereby relieved from liability to this plaintiff for his injury?

This court has held that an unauthorized lease of a railroad
Sheppard, 11 Price, 40, and Gladwell stated in the opinion in the case at
v. Steggall, 5 Bing. 733, are sufficiently bar.

does not relieve the lessor from the liability under the general statute, for an injury caused to property along its line by fire communicated by a locomotive of the lessee. *Pratt v. At. & St. L. R. Co.*, 42 Me. 579; *Stearns v. R. R. Co.*, 46 Me. 95. In Massachusetts, both lessor and lessee are held liable for the injury under a like statute. *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen, 438; *Davis v. Prov. & W. R. Co.*, 121 Mass. 134.

Courts of the highest respectability have held, in well-considered opinions, that the duly authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the State or to individuals." *Singleton v. S. W. R. Co.*, 70 Ga. 464; *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; 1 Redf. Railways, 590.

This view is adopted and sustained in an opinion reviewing the cases and authorities, by the court in Illinois. The court, in its opinion, does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and in so doing is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations toward the public; and there is a matter of public policy concerned that it should not be relieved from the performance of its obligations within the consent of the legislature," adding, "there is no express exemption in the statute which authorized the lease." *Balsley v. St. L., A. & T. H. R. Co.*, 6 Western Rep. 469, 119 Ill. 68; see, also, *Pierce Am. R'y Law*, 244.

In this State, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein * * * shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the State," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. *Mahoney v. At. & St. L. R. Co.*, 63 Me. 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted

solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not, as here, from the wrong of the lessor in the negligent original construction of its depot.

And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company can not, in the absence of statutory exemption, discharge itself of legal responsibility. *St. Louis W. & W. R'y Co. v. Carl*, 28 Kan. 622.

The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in no wise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by the plaintiff and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises, for their condition. For it is settled law, that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity, to persons lawfully upon them; for by the letting for profit, he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance. Among the numerous cases supporting this general view are: *Rosewell v. Prior*, 2 Salk. 459, 12 Mod. 635, where the defendant erected a house thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought * * * for before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See, also, *Rex v. Pedly*, 1 Ad. & E. 822; *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio,

311; *House v. Metcalf*, 27 Conn. 631; *Todd v. Flight*, 9 C. B. N. S. 377. In the last case, Earle, Ch. J., after reviewing *Rex v. Pedley*, *supra*, and *Rosewell v. Prior*, *supra*, said: "These cases are authorities for saying that, if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law and that it reconciles the cases." Also, *Nelson v. Liverpool Brewery Co.*, L. R., 2 C. P. 311; *Owings v. Jones*, 9 Md. 108; *Gandy v. Jubber*, 5 B. & S. 76, 486; 9 B. & S. 15 (1); *Stratton v. Staples*, 59 Me. 94. This principle is recognized in *Campbell v. Portland S. Co.*, 62 Me. 552, 15 Am. Neg. Cas. 301, *ante*; *McCarthy v. York Co. Sav. Bank*, 74 Me. 315, 325; *Burbank v. Bethel S. M. Co.*, 75 Me. 373, 383; *Allen v. Smith*, 76 Me. 335, 341. See, also, *Godley v. Haggerty*, 20 Pa. St. 387, affirmed in *Carson v. Godley*, 26 Pa. St. 111, where buildings were let to the government as bonded warehouses, and being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise.

So, in Maryland, in *Albert v. State*, 6 Cent. Rep. 447, the Court of Appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf and rented it to the tenant, and that at the time of the renting the wharf was unsafe and the defendant knew, or by the exercise of reasonable diligence could have known of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover."

So, in *Swords v. Edgar*, 59 N. Y. 28, the court, after an elaborate review of the cases, held that the lessors of a pier, in the possession of their lessee from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect which existed at the time of the demise.

In a very recent case in Rhode Island, of like facts, the court held both lessor and lessee jointly liable. *Joyce v. Martin*, 4 New Eng. Rep. 796, 15 R. I. 558; see, also, the recent case in New Jersey, of *Rankin v. Ingwersen*, 8 Cent. Rep. 371 (49 N. J.

1. The English cases cited in the case at bar are sufficiently stated in the opinion.

L. 481, affirming 47 id. 18); also a Massachusetts case, *Dalay v. Savage*, 4 New Eng. Rep. 863 (145 Mass. 40).

We are aware that there are a few cases which hold that, even if premises are dangerous when demised, the lessor is not liable to one injured thereby, if the tenant in the lease covenanted to keep them in repair. *Pretty v. Bickmore*, L. R., 8 C. P. 401. And the same principle was subsequently affirmed in a case of very similar facts. *Gwinnell v. Eamer*, L. R., 10 C. P. 658. See, also, *Leonard v. Storer*, 115 Mass. 86, where the lessee covenanted "to make all needful and proper repairs, both internal and external." The language of the court when taken in connection with the facts is explainable in consonance with the early English cases before cited. See, also, the *dictum* in the recent case in Massachusetts, already cited, of *Dalay v. Savage* [145 Mass. 40].

But this principle has been ably reviewed in the strong opinion of *Folger, J.*, in *Swords v. Edgar*, *supra*. This opinion declines to accept the doctrine of the above cases for the reason that they "ignored the rule announced in *Rosewell v. Prior*, *supra*, and followed and established in many cases." *Folger, J.*, in speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised, has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right, without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so, that a person on whom there rests a duty to others, may, by an agreement between himself and a third person, relieve himself from the fulfilment of his duty. Surely an ineffectual attempt to fulfil would not; as if in this case, insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of *Rankin v. Ingwersen*, *supra*, sustains the same view. And we adopt the

doctrine of the case from which we have so largely quoted as sound on legal principles and public policy.

And even if a lessee's covenant would, when broad enough in its terms, operate a relief of the lessor's liability, the covenant here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof, at any time during the term."

The testimony as to the proximity of the awnings at the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry not only on cross-examination, but in the direct-examinations of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate.

Motion and exceptions overruled.

PETERS, CH. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ENGINEER INJURED IN JUMPING FROM ENGINE TO AVOID COLLISION—RAILROAD NOT LIABLE.—In **LASKY v. CANADIAN PACIFIC R'Y CO.**, 83 Me. 461 (*May, 1891*), engineer injured in jumping from engine to escape impending collision, defendant's exceptions were sustained. The official syllabus states the case as follows:

"A railroad corporation is not liable to an employee (in this case an engineer) for an injury happening to him in executing an errand of danger, upon which he is sent by the superintendent of the corporation, unless the superintendent be guilty of negligence in ordering the dangerous act to be performed.

"Where a train-dispatcher habitually performs in the name of the superintendent of a railroad, certain duties of such superintendent in his absence, with the assent of the corporation, any order to an employee from such train-dispatcher, within the limit of his delegated authority, imposes upon both the corporation and the employee the same duties and liabilities as if issued directly by the superintendent himself.

"The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort.

"In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the fact is so far

indisputable that men could not reasonably differ in their interpretation of them."

SECTION MAN FATALLY INJURED IN COLLISION — FELLOW-SERVANT — INCOMPETENCY — DECLARATION — PLEADING. — In **BLAKE, ADM'R v. MAINE CENTRAL R. R. CO.**, 70 Me. 60 (*June, 1879*), plaintiff's intestate, a section man in defendant's employ, fatally injured in collision between locomotive and cars with the hand-car on which the laborer was riding, the points decided in the opinion delivered by APPLETON, CH. J., are stated in the official syllabus as follows:

"It is settled law that a master is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same general employment.

"When there is one general object, in attaining which a servant is exposed to risk, if he is injured by another servant while engaged in furthering the same object, he is not entitled to sue the master, and it does not matter that they were employed in the same kind of work.

"Nor is this rule altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

"The master is liable for negligence in the selection of his servants, but he does not warrant their competency. To recover for an injury caused by the incompetency of a fellow-servant, it must be shown that such incompetency was known, or should have been known to the master, if he had been in the exercise of ordinary diligence.

"The negligence of the master in not selecting competent servants, being the basis of his liability, must be distinctly set forth in the declaration.

"Proper qualifications, once possessed, may be presumed to continue, and the master may rely on that presumption until notice of a change.

"On general demurrer to the declaration, errors, which might be fatal in a special demurrer, will be disregarded."

**WELCH (MATTHEW O'DONNELL, ADM'R) V. MAINE
CENTRAL RAILROAD COMPANY.**

Supreme Judicial Court, Maine, August, 1894.

[Reported in 86 Me. 552.]

PERSON INJURED WHILE ASSISTING THE SERVANT OF ANOTHER—VOLUNTEER—SCOPE OF AUTHORITY—LIABILITY OF MASTER—INSTRUCTIONS—DAMAGES—RESPONDEAT SUPERIOR.—One who has an interest in the work to be performed, either as consignee or servant of a consignee, or in any other capacity, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.

The court distinguishes between such a case and that of one who has no interest in the work to be performed, a mere bystander, who voluntarily assists the servants of another, either with or without the latter's request, doing so at his own risk.

In the latter case the master is not responsible, in the former he will be.

The court apply this principle of liability of the master for injuries thus sustained by the plaintiff, where it appeared that the defendant corporation, while engaged in transporting earth by a gravel train for its own use, undertook to deliver earth from cars in the same train for the use of a third party; the crew in charge of the gravel train having requested the men employed by such third party to assist in dumping the earth out of the cars, and while so engaged one of the latter's crew was injured by a defective car that was improperly loaded. (PETERS, Ch. J., LIBBEY and HASKELL, JJ., *dissenting*.)

Held, that the crew in charge of the gravel train had authority to make such request and give such consent as would authorize the servants of the consignee to remove, or assist in the removal of earth, from the cars. (PETERS, Ch. J., LIBBEY and HASKELL, JJ., *dissenting*.)

The following instructions to the jury were sustained: One who voluntarily assists the servants of another cannot recover from the master for an injury caused by the negligence or misconduct of such servant; that one cannot by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servant of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of a fellow-servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch), consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing. * * * he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made

out in other respects; nor could he be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground. (PETERS, Ch. J., LIBBEY and HASKELL, JJ., *dissenting*.)

Upon a motion to set aside a verdict for excessive damages, *held*, that if under our statute no more than \$5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of \$8,000, for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survived his injuries some six or seven months.

(*Official syllabus*.)

ON MOTION AND EXCEPTIONS. *Overruled*.

ACTION on the case brought by Thomas Welch, and after his death prosecuted by his administrator, to recover damages for injuries received by said Welch, through the negligence of the defendant in using and improperly loading a defective dump-car, which said Welch, at the request and by permission of the defendant, it was alleged, attempted to dump, and was injured while so doing. The case was tried before a jury at the April term of this court, in Cumberland county, 1890, at which a verdict for \$8,000 was rendered for the plaintiff. * * * The case is stated in the opinion.

HARRY R. VIRGIN and A. A. STROUT, for plaintiff.

W. L. PUTNAM, DRUMMOND & DRUMMOND, for defendant.

SITTING: PETERS, CH. J., WALTON, VIRGIN, LIBBEY, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

Walton, J.—It appears that the Maine Central Railroad Company, while engaged in transporting earth for its own use, undertook to deliver some earth for the use of Mr. H. N. Jose. And the evidence tends to show that the crew in charge of the gravel train requested the men employed by Mr. Jose to assist in dumping the earth out of the cars, and that while so engaged a broken car, unevenly loaded, tipped over and fell upon one of Mr. Jose's men (Thomas Welch) and inflicted injuries of which he afterwards died. For these injuries the administrator of Welch has recovered a verdict against the railroad company for \$8,000 damages. The case is before the law court on exceptions and motion for a new trial. We will first examine the exceptions.

1. It is insisted in defense that it was the duty of the servants of the railroad company to dump Jose's earth out of the cars, and that they had no authority to employ Jose's men to assist them, and that Jose's men were trespassers in attempting to do

so, and that, being trespassers, the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants.

It is undoubtedly true that, if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk. And the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases the master will not be responsible. In the latter he will be. This distinction is sustained by every text-book to which our attention has been called, and is well sustained by adjudged cases.

Thus, in *Degg v. Midland R'y Co.*, 1 H. & N. 773, where a mere bystander, without any request from the servants of the railway company, volunteered to assist them in working a turntable, and was carelessly injured by the servants of the company, the court held that he had no remedy against the company. And this case is approvingly cited in *Osborne v. R. R. Co.*, 68 Me., 49 (1).

1. *Volunteer injured in assisting fellow-servant — Nonsuit.*— In *OSBORNE, ADM'X v. KNOX & LINCOLN R. R.*, 68 Me. 49 (December, 1877), it was ruled as follows:

"A person who voluntarily assists the servant of another, in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on the master than a hired servant.

"A servant cannot recover for an injury incurred in assisting a fellow-servant, either voluntarily or on the request of such servant."

The facts in the *OSBORNE* case were as follows:

Stephen Osborne, the plaintiff's intestate, the servant of the railroad corporation, and master of its ferry-

boat, whose duty it was to transport the cars of the defendant company across the Kennebec river, between Bath and Woolwich, left the boat, which was lying at the wharf in readiness to transport the loaded freight cars from Woolwich to Bath, and, at the request of the conductor, unshackled the loaded cars by pulling the bolt which connected them with the others, and in doing so was caught between the bunters and crushed, and died from the effects thereof, some fourteen hours after. The allegation was that the injury was occasioned through the negligence of the company in not providing suitable couplings for the cars, that they were not the safest then known and in general use, and that the cars were not provided with a

But, in *Wright v. London & N. W. R'y Co.*, L. R., 10 Q. B. 298, where the consignee of a heifer assisted in moving the car, in which she had been brought, in order to hasten her delivery, and was carelessly run against and hurt, the court held that he had a remedy against the company—that the rule established in the *Degg* case did not apply. To the same effect in *Holmes v. R'y Co.*, L. R., 4 Exch. 254, 6 Ex. 123.

So, in this country, in *Street Railway Co. v. Bolton*, 52 Am. Rep. 803 (43 Ohio St. 224), where a passenger on a street railway car assisted in backing the car on to the track at a turn-out, and was carelessly run against and hurt, the court held that the railway company was responsible, because the assistance rendered tended to expedite the passenger's journey and prevented his being regarded as a mere volunteer.

sufficient number of brakemen, and that the engines and shifting cars were negligently moved against the loaded freight cars without warning to the intestate, and without any brakemen to apply the brakes, and were forced with violence against his body. The plea was the general issue. (F. ADAMS appeared for plaintiff; H. TALLMAN and C. W. LARRABEE for defendants.)

The following opinion was rendered by APPLETON, CH. J.:

This is an action on the case against the defendants to recover damages for their negligence by which the plaintiff's intestate was so seriously injured in attempting to remove a bolt for the purpose of uncoupling certain loaded freight cars, that he died in a short time afterwards. The plaintiff's intestate was an employee of the defendant corporation, and the injury occurred while in their service.

If the injury was the result of accident solely, the defendants being without fault, the action is not maintainable.

If the injury was caused by the negligence or misconduct of fellow-servants, the law is well settled that a servant thus injured cannot maintain an action against his master for

such injury. *Lawler v. Androscoggin R. R.*, 62 Me. 463, 15 Am. Neg. Cas. 308, *ante*; *Hodgkins v. Eastern R. R.*, 119 Mass. 419; *Sammon v. N. Y. & Harlem R. R.*, 62 N. Y. 251.

Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake it and agree to accept the stipulated remuneration. *Plant v. Grand Trunk Ry.*, 27 U. C. Q. B. 78; *Searle v. Lindsay*, 11 C. B. N. S. 429; *Gibson v. Erie R'y*, 63 N. Y. 449.

It makes no difference in regard to the liability of the defendants that the plaintiff's intestate came into the service voluntarily, as to assist the defendant's servants in a particular emergency, and was killed by their negligence, for by volunteering his services he could not have greater rights nor could he impose any greater duty on the defendants than would have existed had he been a hired servant. *Degg v. Midland R'y*, 1 H. & N. 773. The same rule of law is applicable if a servant of his own motion, at the request of a fellow-servant, should undertake temporarily to perform the duties of a fellow-servant.

If the plaintiff's intestate, through his own want of care, contributed to

So, in *Eason v. R'y Co.*, 57 Am. Rep. 606 (65 Tex. 577), where, to facilitate the loading of lumber, it became necessary to move a car, and the shipper's servant, at the request of the conductor of the freight train, undertook to make the coupling, and was injured by the carelessness of the company's servants, the court held that the railway company was responsible — that the servant was not a mere volunteer, because the assistance which he undertook to render was to facilitate his own work and thus promote the interests of his employer. The rule of exemption and its limitations are very clearly stated in this case.

The distinction running through all the cases is this, that where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servants of another, he does

the injury which resulted in his death, this action must fail. Complaint is made that the cars were so constructed as to be dangerous in coupling and in uncoupling. But the plaintiff's evidence shows that they were such cars as had always been in use by the defendant corporation and by other railroad corporations in this State. Such as they were was well known to the servants of the defendant.

It was held in *Ind., B. & W. R'y Co. v. Flanagan*, 77 Ill. 365, 14 Am. Neg. Cas. 346, that a railroad company was not liable for an injury received by an employee while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed. So in *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133, it was decided that a railroad company which used in its trains an old mail car which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

The plaintiff's evidence shows that one should not go inside the bunters

to lift the pin when unshackling cars. "We stand against them and reach over them. We stand on the outside of the bunters, reach over and pull the pin out. I can do it easily. I guess any one can. I judge that the customary way of unshackling. If the cars were standing apart, so that there was room to pass in, I should not intend to pass in between the bunters." Such is the testimony of one of the plaintiff's witnesses. Another says: "In a moving train it is difficult to lift a bolt without coming in contact with the dead-wood. Situated as this train was I think it was dangerous. There was no trouble in waiting till the train was still." There can be no doubt that the injury sustained arose from a neglect of the obvious precautions which the business engaged in so imperatively required.

The evidence fails to show an insufficient number of servants, and, as already stated, so far as the injury arose from the negligence of fellow-servants, it was at the risk of the servant injured.

Plaintiff nonsuited. WALTON, DICKERSON, BARROWS, DANFORTH and PETERS, JJ., concurred.

so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler. In the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.

This distinction is sustained by the cases cited and by every modern text-book to which our attention has been called; and we are not aware of a single authority which holds the contrary. The recent case of *Wischam v. Richards*, 136 Pa. St. 109, cited by defendant's counsel, is not opposed to it. It sustains it. In that case, the plaintiff was hurt while assisting the defendant's servants in unloading a heavy fly-wheel from a wagon. The court found as a matter of fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, and, consequently, that he had no remedy against their master. The court say that the plaintiff had no interest in the delivery of the wheel; that the delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant; that the participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant, and that this circumstance brought the plaintiff's case within the rule of non-liability. "The distinction," said the court, "is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it." The fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, was the hinge on which the case turned, and defeated his right to recover. If the plaintiff had been sent to obtain the wheel, and, at their request or with their consent, had assisted the defendant's servants in unloading it, in order to hasten or facilitate his own work, and had been injured by their negligence, his right to

recover would undoubtedly have been sustained. As already stated, the hinge on which the cases turn is the presence or absence of self-interest, or a self-serving purpose. In the one case, he is a mere volunteer—in the other, he is a person in the regular pursuit of his own business—a distinction very obvious and substantial.

Mr. Beach, in his work on Contributory Negligence, § 120, says, that where one assists the servants of another at their request, for the purpose of expediting his own business or that of his master, and he is injured by the servants' negligence, the master is liable; that, in such a case, the relation of fellow-servant does not exist; and, in case of injury, the rule of *respondeat superior* applies.

Mr. Thompson, in his work on Negligence, vol. 2, page 1045, says, that care must be taken to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of fellow-servant to them; and, if he is injured by their negligence, the doctrine of *respondeat superior* will apply, and their master will be responsible.

But, in the present case, it is urged by the learned counsel for the railroad company that the crew in charge of a gravel train have no authority to make such a request, or give such consent, as will authorize the servants of the consignee to remove or assist in the removal of earth from the cars.

We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight are the very ones to give such consent or to make such a request, and it has been so held, both in England and in this country.

In Wright's case, L. R., 10 Q. B. 298, it was so held. In that case Mr. Justice Field said that the agent to deliver freight is the proper person to give consent for the consignee to assist in its delivery. That was the heifer case already referred to (1).

And in Lewis v. Railroad, 11 Met. 509, it was so held. In that case a truckman was permitted by one McCoy to assist in the removal of a block of marble from a car. The truckman was allowed to take the car to the depot of another railroad company, and there, by the use of the latter's derrick, to make the attempt to lift the block of marble from the car and place

1. The English cases cited in the rendering repetition of the same, as a case at bar are sufficiently stated, note, unnecessary.

it directly on his truck. But the attempt failed. The derrick gave way and the block of marble fell and was broken. This brought into litigation, directly and sharply, the authority of these two servants,—one a servant of the railroad company and the other a servant of the consignee,—thus to change the place and manner of delivering freight. And precisely the same argument was urged against the authority in that case as is urged against the authority in this case. It was said that McCoy was in no sense a general agent of the railroad company; that his only authority was to receive and deliver freight; that his authority being thus special and limited, his consent to change the place and manner of delivering the freight was not binding upon the company. But the court held otherwise. The court held that the place and manner of delivering freight may always be changed by the servants of the carrier and the servants of the consignee; that their authority to make such changes is included in their authority to receive and deliver freight; that if the consignee of a bale of goods steps into a car and asks for a delivery there, and it is passed over to him, the delivery is complete. The rule established by the authorities seems to be this, that the persons having authority to deliver freight and the persons having authority to receive it, may always agree upon the place and manner of its delivery.

In the present case, the evidence tended to show that the railroad company, while engaged in grading a portion of its track in or near Portland, undertook to leave some earth at a point on the line of its road for Mr. Jose. Mr. Jose employed a contractor by the name of Shannahan to take the earth away. It appeared in evidence that, at the request of the railroad crew in charge of the gravel train, Shannahan's men had assisted in dumping the earth left for Mr. Jose out of the cars; and, on the day of the accident, when Shannahan's men came for more earth, the earth had been left in the cars, and the railroad men had gone on to where they were delivering earth for the use of the railroad. Consequently, Shannahan's men were obliged to dump the earth out of the cars themselves, or wait for an indefinite length of time for the return of the railroad men. It was a cold day in December, and to wait would be neither comfortable for themselves nor profitable for their employer. And so, for their own convenience and to facilitate their own work, Shannahan's men undertook to dump the earth out of the cars themselves. The decedent was one of them. The

evidence shows that he was an experienced man at that kind of work. But one of the cars was defective and had been improperly loaded, and it tipped over and fell upon him and inflicted the injuries of which, at the end of about seven months, he died.

The presiding justice instructed the jury that one who voluntarily assists the servants of another can not recover from the master for an injury caused by the negligence or misconduct of such servants; that one can not by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servants of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of a fellow-servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch) consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing for Mr. Jose, he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground.

These instructions were several times repeated, and not always in precisely the same words; but such were the substance and effect of the instructions.

Counsel for the railroad company profess to be greatly alarmed at the consequences of such a doctrine. What, they ask, will be the limit of such a power? Where will the line be drawn? And they profess to believe that if such a power is conceded to the persons in charge of a gravel train, then the engineers of freight and passenger trains may turn over their engines to inexperienced persons, and the property and lives of the whole community be put in jeopardy. To thus enlarge and magnify the consequences of a ruling may be an ingenious mode of argument, but we do not think it is sound. It does not follow that because the crew in charge of a gravel train may allow the servants of a consignee to assist in removing earth from the cars that, therefore, the engineers of freight

and passenger trains may turn over their engines to inexperienced hands. We give no countenance to such a doctrine. Our decision goes no farther than to hold that the persons having the charge of freight may allow the servants of the consignee to remove it from the cars, and that the latter, while so engaged, have a right to be protected against the negligence of the former. In other words, that, in such cases, the rule of *respondeat superior* applies. Such a doctrine seems to be well sustained by authority, and we believe it to be sound.

2. We will now consider the motion. It is the opinion of the court that the jury were properly instructed, and that the evidence was sufficient to justify a verdict for the plaintiff; but we think that the damages assessed by the jury (\$8,000) were clearly excessive. When one is negligently injured, and he dies immediately, the largest amount recoverable is \$5,000. The amount may be less, but never more. If the person injured survives for a considerable length of time, this limitation does not apply; or, rather, did not, when this action was tried. What the rule may be under the recent statute (Act of 1891, c. 124) will not now be considered. But we think this statutory limitation, whether applicable to the particular case under consideration or not, is entitled to consideration in determining whether or not a verdict is excessive. The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation; but the earning capacity of the deceased is always an important factor. The death of one capable of earning a large income is necessarily a greater loss to his estate than the death of one capable of earning only a small income. The earning capacity of the deceased in this case must have been small. He was not a skilled workman. His only employments had been working in sewers and shoveling gravel. This appears from his own deposition taken before his death. And, notwithstanding he was an unmarried man and had no one dependent upon him for support, and twenty-three years of age, he had not saved a dollar of his earnings. We feel justified, therefore, in assuming that his earning capacity was small. Possibly, if he had lived, he might, later in life, have developed a capacity for more lucrative employments. Probably not. And, in estimating

the loss to his estate, caused by his death, we must be governed by probabilities, not possibilities. Probably, if the deceased had not been injured, and had lived to the common age of man, he would have left but little, if anything, to his surviving relatives. It seems to us that in such a case the damages recoverable for the benefit of surviving relatives ought to be comparatively moderate; that if, under our law, no more than \$5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of \$8,000 for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survives his injuries some six or seven months. Influenced by these considerations, we think a new trial must be granted unless the administrator remits all over \$5,000. If such a *remittitur* is entered upon the clerk's docket, the entry will be:

Motion and exceptions overruled.

PETERS, CH. J., LIBBEY and HASKELL, JJ., *dissented*.

EMPLOYEE INJURED WHILE ATTEMPTING TO BOARD TRAIN FROM STATION—FOREMAN'S DIRECTIONS—FELLOW-SERVANT.—In **CASSIDY** (*Adm'r of the Estate of Alexander Cameron*) v. **MAINE CENTRAL R. R. CO.**, 76 Me. 488 (*December, 1884*), plaintiff was nonsuited on the grounds stated in the official syllabus of the case as follows:

"A person in charge of a railroad construction train ordered the plaintiff's intestate, an employee, to jump upon a car from a station platform, while the train was in motion. The intestate caught hold of a stake in a platform car, the stake not being at the time properly secured by the dog or pawl which serves to keep the stake in a firm and upright position, and thereby fell under the wheels of the cars and was injured. *Held*, That the conductor who gave the order, and the employee who neglected to put the pawl in place, were fellow-servants with the employee who was injured, in a common and associated service, and that the injured employee could not maintain an action against the railroad company for the injury."

The Supreme Court said that the **DOUGHTY** case came within the doctrine well established in Maine, and affirmed in the recent case of *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143 (15 Am. Neg. Cas. 297, *ante*).

PERSON RIDING ON HAND-CAR BY INVITATION OF SECTION FOREMAN — SCOPE OF AUTHORITY — CARRIER AND PASSENGER — PLEADING. — In **HOAR, ADM'X v. MAINE CENTRAL R. R. CO.**, 70 Me. 65 (*June, 1879*), the official syllabus states the case as follows:

"To entitle an administratrix to recover for an injury to her intestate, caused by being negligently run over by defendant's train, while he was riding between stations on a hand-car at the invitation of the foreman of a section, it must appear that the company was a common carrier of passengers by hand-cars.

"No person becomes a passenger except by the consent, express or implied, of the carrier.

"A foreman of a section acts without the scope of his authority by accepting a person for transportation on his hand-car."

RAILROAD MACHINIST INJURED — ASSISTING IN MOVING ENGINE — DIRECTION OF FOREMAN — CONTRIBUTORY NEGLIGENCE. — In **WORMELL v. MAINE CENTRAL R. R. CO.**, 79 Me. 397 (*June, 1887*), machinist in defendant's car shops, directed to assist in moving an engine, injured by his hand being crushed by the buffer upon the tender, verdict for plaintiff for \$4,000 was set aside and new trial granted. The opinion by FOSTER, J., discussed and cited numerous master and servant cases in Maine and Massachusetts, and the rulings are stated in the official syllabus as follows:

"Though an employee, at the time of receiving an injury, is in the performance of duties outside of his regular employment (here, a workman in the car shops was in the yard shackling cars by direction of the foreman), he cannot recover from the employer the damages sustained, if a want of due care on his own part contributed to produce the injury.

"The law requires the exercise of ordinary and reasonable care on the part of each — the master in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged; and the servant in providing for his own safety from such dangers as are known to him or discoverable by the exercise of ordinary care on his own part.

"The question of care is one of fact for the jury, ordinarily; but it is for the court to determine whether there is sufficient evidence of due care on the part of the plaintiff to sustain a verdict in his favor. Evidence so slight as not to have legal weight is insufficient.

"Facts in the case held insufficient to show due care."

EMPLOYEE OF SHIPPER LOADING LUMBER CAR INJURED BY FALL OF LUMBER FROM TOP OF CAR, CAUSED BY NEGLIGENT ACT OF YARD-MASTER — RAILROAD COMPANY LIABLE. — In **POLLARD v. MAINE CENTRAL R. R. CO.**, 87 Me. 51 (*November, 1894*), person employed in loading a car of lumber for a shipper injured by negligent act of defendant's yard-master, which caused several sticks of heavy joists to fall upon him, there was a verdict for plaintiff in Somerset county for \$2,750, to which defendant excepted and moved for a new trial, but the Supreme Court overruled the exceptions and the motion. D. D. STEWART appeared for plaintiff; E. F. WEBB, C. F. JOHNSON, and A. WEBB for defendant. The opinion was rendered by WHITEHOUSE, J., and the case and points decided are stated in the official syllabus as follows:

"The plaintiff recovered a verdict for personal injuries caused by the negligence of the defendant's yard-master in breaking off a car stake that supported a load of lumber, thus causing several heavy joists to fall upon him from the top of the car. *Held*, that to maintain the action, the plaintiff must maintain three propositions: 1. That in breaking down the stake the yard-master performed an act which an ordinarily careful and prudent person in the same relation would not have done; 2. That the act was done in the course of his employment and in the line of his duty; 3. That there was no contributory negligence on the part of the plaintiff.

"The evidence relating to the yard-master's conduct was in dispute, and therefore presented an issue of fact for the jury. In this case the finding of the jury upon this point was not so palpably wrong that no jury of fair-minded and impartial men could reach such a conclusion. *Held*: That the question whether the yard-master was acting within the scope of his employment cannot properly be determined by sole reference to the inquiry whether the car had been reported as ready for shipment. The nature of the employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes sought to be attained, were all material considerations and formed the real test of liability. *Held*, also: That the plaintiff's negligence with respect to his manner of loading the lumber did not proximately contribute to produce the injury. The plaintiff's conduct in this respect was not a part of the immediate transaction which caused the injury, but a prior, distinct and independent transaction. It may have afforded the occasion or opportunity of the yard-master's active agency in breaking off the stake, but it formed no part of the direct and efficient cause of the injury. Under such circumstances the plaintiff's conduct cannot legally be deemed a contributory cause of the injury.

"The defendant excepted to certain remarks made by counsel for the plaintiff during the charge of the presiding justice. *Held*: That the irregularity as an interruption was a matter between the court and counsel, and was not prejudicial to the defendant, nor open to the defendant on exceptions.

"The practice relating to the proper method of presenting exceptions to the law court prescribed in *McKown v. Powers*, 86 Me. 291, affirmed.

"*O'Brien v. McGlinchy*, 68 Me. 552 (15 Am. Neg. Cas. 303, *ante*), and *Lasky v. Canadian Pac. R'y Co.*, 83 Me. 461 (15 Am. Neg. Cas. 326, *ante*), affirmed."

O'CONNELL v. BALTIMORE & OHIO RAILROAD COMPANY.

Court of Appeals, Maryland, October, 1863.

[Reported in 20 Md. 212.]

RAILROAD EMPLOYEE INJURED BY BEING THROWN FROM DUMP TRAIN—NEGLIGENCE OF FELLOW-SERVANT—RAILROAD COMPANY NOT LIABLE.—When several persons are employed in the same general service, and one is injured by the carelessness of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible. The liability to injury of one person from the carelessness of his fellows, is but an ordinary risk, against which the law furnishes no protection but by an action against the wrongdoer.

Though it is the duty of a railroad company to exercise all reasonable care in procuring for its operation, sound machinery, and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for the injuries occasioned by the neglect of any of his co-servants, employed in the same general business of operating the road (1).

So *held*, in an action to recover damages for injuries sustained by plaintiff, an employee engaged in shoveling dirt into dump cars, who was thrown out of a dump train while the same was rapidly rounding a curve, due to the alleged carelessness of the persons operating the train.

1. The ruling in the *O'CONNELL* case (the case at bar), was followed in *SHAUCK v. NORTHERN CENTRAL R'y Co.*, 25 Md. 462 (April Term, 1866), an action by a brakeman who was injured by his arm being run over by the wheel of a car, it being alleged that the accident was attributable to the defective condition of the engine to which the train was attached. In the *SHAUCK* case, *supra*, plaintiff's evidence showed that on the day preceding the accident, a bolt connected with the steam valve of the engine had broken, and the engine

APPEAL from the Superior Court of Baltimore City. *Judgment affirmed.*

THIS was an action brought by the appellant against the appellee, on the 17th of May, 1858, in the Superior Court of Baltimore city, to recover damages for an injury sustained by him while riding upon the cars of the Baltimore & Ohio Railroad Company, from one point to another of their road in the performance of his duties as laborer, in which capacity he was employed by the company. The pleadings in the cause are set out in the opinion of this court.

Exception. At the trial of the cause the plaintiff proved that on the 7th of September, 1857, being in robust health, he was employed with others as a laborer upon the Baltimore & Ohio railroad, in shoveling and pitching dirt and gravel into dump-cars, to be carried to other parts of the road to be

had been sent to the defendant's shop to be repaired. The workmen at the shop were unable to extract this broken bolt, and on the morning of the accident the engine, without being repaired, was sent out attached to a freight train, on which the plaintiff was brakeman. When the engine was brought out of the shop in the morning it worked badly, and was used that day in consequence of the other engines being all in service. The nature of the injury to the engine was such as to cause it to jerk and work irregularly in starting or stopping the train, because of the steam leaking through the valve when it should be shut off. Although the engine was defective on leaving the defendant's shop on the morning in question, it was not so much so as not to be manageable with care, but prior to the accident it had become unmanageable in consequence of said broken bolt working out on the road. The engineer of the train, on arriving at Cockeysville, had found Lewis, the defendant's master of machinery, there, and reported to him the condition of the engine, and the said Lewis requested him to try and get the train to York, some forty miles dis-

tant, but to do his best not to injure anybody.

The defendant (in the *SHAUCK* case) offered evidence to show that Clark, the superintendent of the defendant's road, Lewis, its master of machinery, Cole, the foreman of its machine shops at Bolton, and the men employed under him, and Davis, the assistant master of machinery, and those employed at the Bolton depot in despatching the defendant's trains, were competent and faithful men and officers; that the number of engines in the service of the defendant at that time accomplished all the work the defendant had for them to do, but were working to their full capacity; and that the said engine was in good order up to the day preceding the day of the accident, and was put in good order again afterwards merely by replacing the broken bolt with a new one, and that the defect in the engine was not communicated to Cole, the foreman of the defendant's shops, prior to its leaving town on the morning of the accident.

The opinion rendered by *BARTOL, J.*, in the *SHAUCK* case, *supra*, is as follows: "All errors of pleading having been released, the questions to be

dumped out; that the cars were not quite loaded when the signal was given for the men to get into the cars, that the train might get out of the way of a coming Washington train. One Shaefer was the engineer, and Patrick Downey the boss of the train who directed the laborers in their work, and gave the orders when to stop work and get into the cars. The dump train moved very fast, and as they were rounding a curve, the car in which the plaintiff was, dumped and threw out all the men but one, who clung to the upper side of it. The collar-bone of one of the men was broken and the five toes of one of the plaintiff's feet were so mangled and mashed that they had to be amputated; and he now goes on crutches, will suffer pain as long as he lives, and will never be an able-bodied man.

The defendant proved that the conductor of the dump train "was a steady industrious man, of competent skill and experience in his business as foreman, and of general good habits and

decided on this appeal are presented by the facts stated in the bill of exceptions, and the prayers offered at the trial; these, in our opinion, bring the case within the principles lately adopted by this court in *O'Connell v. Balt. & O. R. Co.*, 20 Md. 212; after a careful examination of the cases, the rule of law was there stated to be that "when several persons are employed in the same general service and one is injured by the carelessness of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible."

"This principle was first announced in *Priestley v. Fowler*, 3 M. & W. 1, and a few years afterwards it was adopted in *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49, and in the able opinions delivered in those cases was placed upon reasons that seem to us to be entirely satisfactory. It has been followed by the great current of authorities both in England and this country, and may now be considered as a part of the common law.

"It is immaterial to consider whether this principle is based upon the implied contract of the parties, or

whether it must be considered as resting upon grounds of public policy which make it unreasonable in such cases to apply the doctrine of *respondeat superior*.

"It is now established that the limit of the duty of the company to its employees is to exercise 'ordinary and reasonable care' in procuring for its operations sound machinery and faithful and competent employees, and while it is responsible for the omission to perform these duties, it does not guarantee their safety from the consequences of the carelessness or neglect of its other employees engaged in the same general business of operating the road.

"Without entering into a discussion of the reasons on which this principle is founded, or a particular analysis of the numerous cases cited in argument, all of which have been carefully examined, we are of opinion that this case is governed by the decision in *O'Connell v. Balt. & Ohio R. Co.*, 20 Md. 212, and that there was no error in the rulings of the Superior Court upon the prayers. Judgment affirmed."

character;" that "the car was in good order; that it was the practice for the men who dumped the car to adjust it; that if the blocks of the cars had been out of order, they could neither have been loaded nor used on the track; that it is the duty of the engineer and foreman of the ballast train to examine the condition of the cars and see that they are properly adjusted; and that the train in question was entirely under the control of Downey."

The plaintiff offered nine prayers, in substance as follows:

1. If the plaintiff was employed as a common laborer to dig gravel and dirt on the sides of the road, and was transported to different points on the road where he was required to work, in the dump-cars used in said business, and said cars were under the control and direction of a superintendent, one Downey, and of the engineer of the locomotive; and the plaintiff had nothing to do with, and in point of fact, took no part in the management of the train; and while being so transported and employed, the car in which he was riding, by reason of a defect therein, was upset, and the plaintiff thereby injured, the plaintiff is entitled to recover.

2. That if there was no defect in the car, but it was upset by reason of the negligence of the superintendent in not properly adjusting the mechanism which maintained the car in its horizontal position, the plaintiff is entitled to recover.

3. That if the failure to adjust the mechanism was due to a want of system in loading, unloading and righting the cars, there was not reasonable care, skill and prudence on the part of the superintendent, and the plaintiff is entitled to recover.

4. Is like the third, except it refers it to the jury to find whether the practice in loading, etc., was reasonable and prudent.

5. If the jury should find the facts in the first prayer, except that there was a defect in the car, they constitute *prima facie* evidence of a defect in the car or of negligence in the superintendent or engineer, and cast upon the defendant the burden of proving that the accident was not occasioned by a defect in the car, nor by the fault of the superintendent or engineer.

6. If the jury find the facts hypothetically stated in the last prayer, it devolves on the defendant the duty of proving that the disaster was not caused by a defect in the car, and that Downey was a person of competent skill, and in every respect qualified for his position, and that the disaster was not caused by negligence, want of skill or prudence on the part of Downey.

7. If the disaster was caused by a defect in the car, which by the exercise of ordinary care the defendant might have known and provided against, the plaintiff is entitled to recover.

8. If the accident was caused by the substitution of a wooden pin for an iron one, the plaintiff is entitled to recover.

9. That if by the rules and regulations of the company, it was made the duty of the superintendent to examine the cars and see that they were in a good and safe condition, and to send them for repairs, when necessary, to the workshops of the defendant, and that the superintendent knew the car was injured and defective, the plaintiff is entitled to recover.

The defendant offered the following prayers:

1st. "That if the jury shall believe from the evidence that the plaintiff in this action was on the 7th of September, 1857, employed by the defendant as a laborer, along with others attached to a dirt train on the road of the defendants, and under the direction of a foreman, and that the said foreman and the said plaintiff and others employed with the said train were engaged in the common employment of repairing and keeping in order the said road, and that the said plaintiff was on that day riding in one of the cars of said train in the usual course of his employment, and that while so riding, the said car accidentally upset, and that the plaintiff was thrown out and injured thereby, then the plaintiff is not entitled to recover damages for such injury, unless he shall satisfy the jury by evidence, that the car in which he rode was not of approved construction and material when put upon the road of the defendants for use by the employees thereof, or that the foreman of said employees, or the co-employees of the plaintiff, were not persons of competent skill and experience and general good habits and character in their respective employments.

2nd. "That if the jury shall believe the facts in regard to the employment, and also those in regard to the happening of an accident to the said plaintiff stated hypothetically in the first prayer, and shall also find from the evidence that the said accident was to be attributed to the use of a wooden pin made on the day of the accident by the foreman, in place of an iron one to keep in place the block, that prevented the car already referred to from upsetting, even then the plaintiff is not entitled to recover, provided the jury shall also find that the said car when put upon the road of the defendants for use by the employees thereof, was of approved construction and material.

3rd. "That if the jury shall find from the evidence the facts in regard to the employment of, and accident to the plaintiff, stated hypothetically in the first prayer, and shall further find that the said accident happened in consequence of the car, on which the plaintiff was riding at the time being out of repair, and being improperly used while so out of repair by the foreman, under whom the plaintiff worked, instead of being set aside until repaired, the plaintiff is not entitled to recover, provided the jury shall find that said foreman was a person of competent skill and experience in the station he occupied, and of good habits and character.

4th. "That if the jury shall find from the evidence the facts in regard to the employment, and also those in regard to the happening of an accident to the plaintiff, stated hypothetically in the first prayer, and shall further find from the evidence that the said accident happened in consequence of the imperfect adjustment and fastening in its place by the co-employees (of the plaintiffs) or any of them, of a block which prevented the car already referred to from upsetting, then the plaintiff is not entitled to recover, provided the jury shall find from the evidence that the co-employees of the plaintiff were persons of competent skill and experience in their respective stations, and of general good habits and character.

5th. "If the jury shall believe from the evidence the facts in regard to the employment of, and accident to the plaintiff, stated hypothetically in first prayer, and shall further find that the said accident happened in consequence of the car on which the plaintiff was riding at the time being out of repair, and being improperly used while so out of repair by the engineer in charge of the train (if the jury shall believe from the evidence that it was the duty of the engineer to determine when a car was not fit for use), instead of being set aside and repaired, then the plaintiff is not entitled to recover, provided the jury shall also find that said engineer was a person of competent skill and experience in the station he occupied, and of general good habits and character."

The court below (Martin, J.) rejected the prayers of the plaintiff, and granted those offered by the defendant, whereupon the plaintiff appealed.

The cause was argued before BARTOL, GOLDSBOROUGH and COCHRAN, JJ.

W. MEADE ADDISON, for appellant.

JOHN H. B. LATROBE and F. C. LATROBE, for appellee.

Goldsborough, J.—The action in this case was instituted by the appellant against the appellee in the Superior Court of Baltimore city, to recover damages for an injury sustained by him while in the appellee's employment. It is alleged in the declaration that whilst the appellant was engaged in his work as an employee, without any neglect or carelessness on his part, but through the carelessness of another employee over whom the appellant had no control, a dumping or gravel car of the appellee was upset and fell upon the appellant, and he was permanently injured. That the car on which he was riding was upset from its defective construction and the unskillfulness and neglect of the employee having charge of the car.

To these allegations the appellee pleaded "not guilty."

At the trial and after the evidence detailed in the record had been submitted to the jury, the appellant offered nine, and the appellee five, prayers.

The prayers of the appellant were rejected, and those of the appellee were granted by the court. The verdict and judgment being for the appellee, this appeal was taken.

The law arising out of the relation of the parties litigant in this case is presented for the first time for our consideration. It affects a large class of citizens, a class, constantly being augmented by the diversity of employment incident to the enterprise of the age.

In the absence of any controlling decision in this State, we find ourselves aided in the formation of our opinion by a current "of decisions both in England and in this country, entitled to our highest consideration and greatly relieving us from the responsibility of settling the law as to the relative obligations of parties holding positions similar to the parties in this case."

It is proper to state that though the appellant received the injury stated in his declaration while riding on one of the appellee's cars, it is not claimed that he was a *passenger* who had paid for the privilege of travel, but one of a number of laborers who were in the employment of the appellee, who were required to ride upon the cars to and from the place of their daily labor.

The appellant seeks to recover damages upon the ground that there is an implied warranty on the part of the appellee of the soundness of the machinery put in the hands of its ser-

vants so far as any unsoundness therein may be discovered by the exercise of proper care and diligence; and in the employment of men of care, skill and capacity for the full and faithful discharge of the duties that appertain to the position they severally occupy. The appellant also relies upon the fact, as he insists, that he, with other laborers, were under the management and control of one Downey as superintendent of the laborers; that Downey was rash and wholly regardless of the safety of the men, and that the train of dumping-cars, upon one of which the appellant was riding, was managed by an engineer having charge of the train. That neither Downey nor the engineer inspected the cars at or before the time they were started, and that the fixtures by which the cars were adjusted to prevent their dumping, especially the car on which the appellant was riding, were out of order and unadjusted at the time of the accident, and from all these causes he suffered the injury complained of in this suit.

The appellee rests its defense upon the relation of the parties as employer and employee.

That there is no responsibility if the injury arose from the conduct of a co-employee engaged in the same employment, though the co-employee be superior to the one injured.

That the appellee can not be held responsible if it employed a competent and skilful engineer and superintendent; and does not warrant that these individuals shall faithfully discharge their duty in managing the hands and keeping the machinery in its original safe condition; and that it is a legal and sufficient defense to this action, if the appellee did in fact employ a skilful and competent engineer and superintendent; and if the cars put upon the road were of approved construction, and were in a proper state and condition when put into the hands of the engineer and superintendent. That at the time of the accident and injury to the appellant, he was riding on one of the cars of which he was required to avail himself in order to facilitate his labor and service. That no compensation was paid directly or indirectly by the appellant for the passage, and the appellee was under no obligation to convey him to or from his work. Therefore he must be presumed to know the nature of his employment and to assume all the risk incident to the service he undertook to perform; and one of those risks was his liability to injury from the carelessness of others who were employed by the appellee in the same service.

Having thus, with due care, stated the character of the claim of the appellant and the defense of the appellee, we fully concur in the opinion that the defense is well taken.

It is sustained in all its aspects by an almost unbroken current of authorities both in England and in this country. See the case of *Priestley v. Fowler*, 3 Mees. & W. 1 (1); *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Coon v. R. R. Co.*, 1 Seld. 493; *Hayes v. R. R. Co.*, 3 Cush. 270; *Gilshannon v. R. R.*, 10 Cush. 228 (2); *Hard v. R. R. Co.*, 32 Vt. 473; *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384. This last case, decided in 1854, is almost identical in its prominent features with the case under consideration. In several of the earliest of these cases, the question being regarded as a new and important one, the courts, in view of its novelty and importance, considered and decided it after careful and mature deliberation.

The following conclusions of law applicable to this case may be deduced from the above authorities:

When several persons are employed in the same general service, and one is injured by the carelessness of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible. The liability to injury of one from the carelessness of his fellows, is but an ordinary risk, against which the law furnishes no protection but by an action against the wrong-doer.

Though it is the duty of a railroad company to exercise all reasonable care in procuring for its operation sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for the injuries occasioned by the neglect of any of his co-servants employed in the same general business of operating the road. *Ryan v. Cumberland Valley R. Co.*, 23

1. In *Priestley v. Fowler*, 3 Mees. & W. 1, the defendant was sued by his servant, injured by the breaking down of a van, in which he and a fellow-servant were carrying goods for his master, by reason of its weakness and excessive loading. Defendant was held not to be liable. The court said that the principal was under no im-

plied obligation to his servant for the sufficiency of the van, as he had no more knowledge of its condition than the servant himself.

2. The *Farwell*, *Hayes* and *Gillshannon* cases are reported with the Massachusetts cases in this volume, pages 407, 505, and 413, *post*.

Pa. St. 386, 387; *Hard v. R. R. Co.*, 32 Vt. 473; *Farwell v. R. R. Co.*, 4 Met. 49 (1).

We are of opinion that these rules of law are so directly applicable to the case under consideration that they constitute a flat bar to the appellant's right to recover.

It only remains for us to consider the ruling of the court below in rejecting the appellant's and granting the appellee's prayers.

It is manifest from what we have said as to the law controlling this case that the appellant's 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th prayers, could not have been granted.

We will consider the appellant's 5th in connection with the appellee's first prayer. They both embrace the question, on whom is imposed the burden of proof.

Though the Supreme Court of the United States, in the case of *Stokes v. Saltonstall*, 13 Pet. 191, 7 Am. Neg. Cas. 297, recognize the doctrine that a stage proprietor warrants the safety of passengers as far as human care and foresight can go, and that he will transport them safely; and the facts that "a carriage was upset and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness or negligence or want of skill on the part of the driver, and throws upon the defendant the burden of proof that the accident was not occasioned by the driver's fault;" yet a majority of this court are of opinion that the above case is not applicable to this. The appellant held no such relation to the appellee; it was under no obligation to look to the safety of the appellant under the circumstances of this case; did not contract to carry him to and from his place of work, and received no compensation therefor; and he having alleged in his declaration the causes of his injury, must sustain his allegations as in ordinary cases, by corresponding proof. The court below, therefore, in rejecting the fifth prayer of the appellant and granting the first prayer of the appellee, ruled correctly.

The appellee's 2nd, 3rd, 4th and 5th prayers were properly granted. They are sustained by the law of this case as herein announced and are otherwise unobjectionable, as they submit the matters of fact contained in them to be found by the jury.

Judgment affirmed.

1. Reported with the *Massachusetts* cases in this volume, 407, *post*.

LABORER UNLOADING CAR STANDING ON SIDING LEADING TO WAREHOUSE THROWN FROM CAR AND FATALLY INJURED — CONTRIBUTORY NEGLIGENCE — CONCURRING NEGLIGENCE — INSTRUCTION. — In **NORTHERN CENTRAL R'Y CO. v. STATE** (to the use of M. O. GEIS, widow et al.), 31 Md. 357 (*November, 1869*), an appeal from judgment rendered for plaintiff in the Superior Court of Baltimore city, in action brought in the name of the State of Maryland for the use of the widow and children of Charles Geis, deceased, to recover damages for his death alleged to have been caused by the negligence of the railway company, judgment was *reversed* for erroneous instructions, etc. It appeared that the deceased was a German laborer, engaged with others, at the time of the accident, in unloading a car laden with corn, standing upon a siding leading into the warehouse of C. Slagle & Co., on North street, in the city of Baltimore. While so engaged, he was thrown from the car, and received the injury from which he afterwards died. The deceased and the other laborers in the car were employed by Knox & Gill, the purchasers of the corn. The car and the team belonged to the appellant, and at the time of the accident were under the control of the appellant's driver and brakeman. At the trial below, the plaintiff offered evidence to show that the team was attached to the car, and the car started without any notice to the deceased, and that the injury which he received was attributable to this fact. The defendant offered evidence to show that notice was given, sufficient to put the deceased upon his guard, but that he undertook to assist a drayman, whose dray was standing beside the car, receiving a load from it, to complete his load by throwing on one more bag. And that in consequence of the sudden movement of the car, while he was so engaged, the deceased was thrown out and injured. The injured man was carried to the opposite side of the street, taken charge of by his fellow-laborers, carried home on the top of a wagon loaded with bags of corn, and died after lingering five days.

The rulings of the Court of Appeals (per ALVEY, J.), are stated in the syllabus to the official report as follows:

"Where evidence is conflicting as to whether a person injured contributed by negligence to his own injury, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves.

"Where the party inflicting the injury, by proper care, might avoid the consequences of the negligence of the party injured, or where the latter could not avoid the consequences of the former's negligence, an action will lie. But where, from the proof of the nature of the accident, it appears that the negligence of the parties

was concurrent, and co-operated to produce the injury, no action will lie; the law refusing to apportion the fault, and regarding the negligence of each party as equally proximate.

"In order for a person to exercise proper care in avoiding the consequences of his own or another's negligence, he must have time to become aware of the conduct and situation of the latter.

"A prayer that the plaintiff could not recover for an injury to a person deceased, if the deceased 'by his own neglect or want of care' contributed to the accident, failed to define the character of neglect or want of care, and was properly rejected."

In holding that the instructions given were misleading the Court of Appeals said:

"In the first part of these instructions it was assumed that the question of remote and proximate cause of the injury was involved, and they were framed with a view to instructing the jury upon that rather intricate and difficult question. But, according to our view of the case, no such question was really involved, and the minds of the jury should not have been perplexed with it. In *Northern Cent. R'y Co. v. State* (use of Price), 29 Md. 420, 12 Am. Neg. Cas. 257, the rulings in which are supposed to govern this, a different state of facts existed from those appearing in this record, and questions arose and distinctions were taken there that do not apply here. There, from the nature of the case, the question as to the remote and proximate cause of the death arose. But here, according to the proof of the nature of the accident, if negligence be imputable to both parties in reference to the injury, it must have been concurrent, and co-operated to produce the injury complained of. And in such case no action would lie; for it would be impossible to apportion the damages, or to exactly ascertain how much each party contributed, by his negligence, to the production of the injury." * * *

WONDER v. BALTIMORE AND OHIO RAILROAD COMPANY.

Court of Appeals, Maryland, May, 1870.

[Reported in 32 Md. 411.]

BRAKEMAN INJURED BY DEFECTIVE BRAKE—DEFECTIVE MACHINERY — FELLOW-SERVANTS — INCOMPETENCY — BURDEN OF PROOF—ASSUMPTION OF RISK.—A master is not liable to his servant for an injury occasioned by a defect of machinery furnished to the latter to operate, unless there was negligence in providing such machinery, or, knowing of the defect, the master omitted to warn the servant of its existence. And where the defect producing the

injury complained of, was the consequence of the incompetency or neglect of a fellow-servant, or where the origin of the defect did not appear, the master is not liable to his servant, it not appearing that he had been guilty of negligence either in selecting the fellow-servant or in providing the machinery in which the defect occurred.

- All who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence.
- A brakeman on a train of cars is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling stock of the road, and with the superintendent of the movement of trains.
- A brakeman cannot maintain an action against a railroad company by which he was employed, for an injury sustained by him, and which resulted from a defect in the brake on the train he was operating, if the defect existed by reason of the neglect or want of care of his fellow-servants, unless the railroad company was negligent in the selection of those servants; and the *onus* of proof of such negligence is on the plaintiff.
- A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliance, and he may even have in use a machine or an appliance for its operation, shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant think proper to operate such machine, it is at his own risk; and all that he can require is, that he shall not be deceived as to the degree of danger that he incurs.

(*Syllabus to official report.*)

APPEAL from the Baltimore City Court. *Judgment affirmed.*

This was an action on the case brought by the appellant, a brakeman, to recover damages for an injury sustained by him while in the employ of the appellee. The defendant pleaded not guilty, and thereon issue was joined.

Exception: The plaintiff asked the following instruction:

If the jury shall find, from the evidence, that the defendant was the owner of a railroad track, and of certain cars which were drawn on said track by horses, and that the plaintiff was employed by the defendant to work in its service as brakeman on said cars, and that, while engaged in doing his duty on one of said cars as brakeman, the brake thereof gave way, and the giving away of the brake caused the plaintiff to sustain serious, severe and permanent bodily injury, and that the giving way of the brake was caused by a defect or insufficiency therein, arising from an injudicious and unsafe construction, which might have been discovered by the exercise of ordinary care on the part of the defendant, and which rendered the car unsafe for the purposes for which it was used, and which was unknown to the

plaintiff; and if the jury shall further find that the defendant did not use reasonable and ordinary care to provide a brake of safe construction for said car, and that the plaintiff could not have avoided the accident which injured him by the exercise of ordinary care, and that he was, on that occasion, using ordinary care, then the plaintiff is entitled to recover.

And the defendant prayed the court to instruct the jury as follows:

1. If the jury believe, from the evidence, that the plaintiff, at the time and place when and where he suffered the injury complained of, was a brakeman in the employ of the defendant, and acting as such, and that the said injury was caused by the brake on the car on which he was so acting as brakeman being defective and out of order, and that such defective condition was owing to the negligence of other servants of the defendant, whose duty it was to see that none but brakes in good condition should be put in service or used; yet the plaintiff can not recover unless he shall satisfy the jury that in selecting the employees or servants, through whose negligence the accident occurred, the defendant did not use reasonable care in procuring for its operations faithful and competent employees; and further, that in this case the plaintiff has offered no evidence from which the jury may find that the defendant did not use such care in the selection of their said employees.

2. If the jury shall believe from the evidence that the happening of the accident, whereby the plaintiff was injured, was caused by the brake on the car in question being defective and out of order, and that such defective condition of the brake was owing to the carelessness or negligence of the agents or employees of the defendant, whose duty it was to see that the brake in question was in good order before being put in use by the defendant; yet the plaintiff can not recover, unless he shall satisfy the jury, from the evidence, that the defendant did not use reasonable care in procuring, for its operations, faithful and competent employees and sound machinery; and further, that in this case the plaintiff has offered no evidence to show that such reasonable care was not used by the defendant, and, therefore, their verdict must be for the defendant.

3. That to enable the plaintiff to recover in this action, he must satisfy the jury that the brake spoken of by the witnesses, attached to the car on which he was acting as brakeman at the time of the accident, was insufficient and defective, and that

such insufficiency and defectiveness was well known to the defendant, or that the defendant did not exercise reasonable care to procure sound machinery and faithful and competent employees.

4. If the jury shall believe from the evidence that the brake of the car on which the plaintiff was acting as brakeman at the time of the accident, was in good order and competent for its purpose, and that his neglect in not using it in a proper manner, was the cause of the injury complained of, then he is not entitled to recover.

5. If the jury shall believe from the evidence, that if the plaintiff, by noticing the action of the brake, could have seen the way to use it, so as to make the brake effective, and failed to do so, whereby the accident happened, then he is not entitled to recover.

The court refused to give the instruction asked by the plaintiff, and gave the instructions asked by the defendant. To this ruling the plaintiff excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before BARTOL, CH. J., STEWART, BRENT and ALVEY, JJ.

WM. SHEPARD BRYAN, for appellant.

F. C. LATROBE and JAMES A. BUCHANAN, for appellee.

Alvey, J.—This is an action by an employee against his employer, to recover for an injury received while engaged in the work for which he was employed, by reason of defective machinery that he was required to operate.

The plaintiff was a brakeman in the employ of the defendant, on one of its burden trains, and, while engaged in his work, he received the injury complained of, which was occasioned by an alleged defect in the brake to one of the cars that he was using in the regular course of his duty. The supposed defect consisted in the use of a hook instead of an eye-bolt on the brake, and in having the point of the hook turned the wrong way. In attempting to use the brake, in consequence of the defect, the plaintiff was suddenly thrown from the car to the track, and was caught between the brake-shaft and the trucks of the car and dragged a considerable distance, and seriously injured. He alleges that there was negligence on the part of the defendant in regard to the use of this defective brake, and that he is entitled to recover from the company the damages sustained by him as the consequence of such negligence.

It is now settled that there is no contract obligation imposed upon the master, from the mere relation that he bears to the servant, to provide machinery of any particular character or description, to be operated by the latter, nor is there any implied undertaking on the part of the former, resulting from the mere relation as employer, that the machinery shall be kept free from defects, such as may expose the servant to danger. The servant is a free agent to select the employment into which he enters, and in contracting for the wages that he is to receive, must be supposed to take into account the risks to which the employment may expose him; and among those risks are the defects and accidents of the machinery, and the negligence and want of caution of fellow-servants in the common employment. To hold the master liable to the servant for all the injuries resulting to the latter from defects in machinery or materials upon which he may be employed, or from the negligence of fellow-servants, engaged in the common employment, would go far to impede, if not to make it impossible to carry on, many of the great works of the country. All that can be required of the master, and for the neglect of which he is responsible to the servant, is, that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow-servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment. He is required, also, as far as he can by reasonable care, to avoid exposing his servant to extraordinary risks, which could not have been reasonably anticipated at the time of the contract of service, though, as to such extraordinary risks, it would seem the master does not guarantee against them. *Riley v. Baxendale*, 6 Hurl. & N. 446 (1).

From these general principles it follows that the master is not liable to his servant for any injury occasioned by a defect of machinery furnished to the latter to operate, unless he was negligent in providing such machinery, or, if he knew of the defect, in omitting to warn the servant of its existence. And, where the defect producing the injury complained of, was the consequence of the incompetency or neglect of a fellow-servant,

1. In *Riley v. Baxendale*, 6 H. & N. 446, it was held that from the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment.

or where the origin of the defect did not appear, it has been held that the master was not liable to his servant, it not appearing that he had been guilty of negligence, either in selecting the fellow-servant or in providing the machinery in which the defect occurred. *Tarrant v. Webb*, 18 C. B. 797; *Ormond v. Holland*, El. B. & El. 102; *Wigmore v. Jay*, 5 Exch. 354; *Brown v. Accrington Cotton Spinning, etc., Co.*, 3 Hurl. & C. 511 (1).

Who is a fellow-servant, within the meaning of the rule, has been a question of some diversity of decision, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking

1. In *Tarrant v. Webb*, 18 C. B. 797, it was held that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. It was also held that the master is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant is incompetent, but whether the master did not exercise due care in employing him.

In *Ormond v. Holland*, El. Bl. & El. 102, s. c., 96 Eng. C. L. 100, (Q. B., 1858), it was held that a master is responsible to his servant for the injury received in the course of his service, if it be shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident; but in the absence of a special con-

tract the master is not liable for an accident not proved to have been occasioned by his personal negligence. In this case the defendants were builders and were constructing a church, the plaintiff working for them as a bricklayer. While plaintiff was ascending a ladder one of the rounds broke and he fell and was injured. There was some evidence that the ladder was defective, but none to bring knowledge to defendants. Defendants held not liable for the accident.

In *Wigmore v. Jay*, 5 Exch. 354 (Exch. of Pleas, 1850), it appeared that defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. Held, that no action could be maintained against the defendant

the risk of the other's negligence. Or, to state the rule more generally, in the language of a decision that has been approved by this court, "all who are engaged in accomplishing the ultimate purpose in view — that is, the running of the road — must be regarded as engaged in the same general business, within the meaning of the rule." *Hard v. Vermont & Canada R. Co.*, 32 Vt. 473; *O'Connell v. Balt. & Ohio R. Co.*, 20 Md. 212, 15 Am. Neg. Cas. 341, *ante*. It follows, therefore, that the brakeman on the train is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, and with the inspector of the machinery and rolling-stock of the road, and the superintendent of the movement of trains. *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49; *Hayes v. Western R. Co.*, 3 Cush. 270 (1); *Sherman v. Rochester & Syracuse R. Co.*, 17 N. Y. 153; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 382; *Feltham v. England, L. R.*, 2 Q. B. 33; *Searle v. Lindsay*, 11 C. B. (N. S.) 429 (2). If, therefore, the defect in the brake that caused the injury in the present instance existed by reason of the neglect or want of care on the part of such employees of the defendant, the latter can not be held liable, unless there has been negligence in the selection of those servants, and the *onus* of proof of such negligence is on the plaintiff. 20 Md. 212; 25 Md. 462; 27 Md. 589 (3).

under the 9 and 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose.

In *Brown v. Accrington Cotton Spinning, etc., Co.*, 3 H. & C. 511, it was held that a workman cannot recover damages from his employers for injuries sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly intrusted the execution of the work to an incompetent person.

2. In *Feltham v. England, L. R.*, 2 Q. B. 33, it was held that the rule the master may have in use in his servant for injuries sustained from the negligence of a fellow-servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

In *Searle v. Lindsay*, 11 C. B. N. S. 429, it was held that a master was not liable for an injury to a servant caused by neglect of a fellow-servant, if there was no negligence or want of care on the part of the master, either in providing proper machinery or in selection of competent servant.

3. See the *O'Connell*, *Shauck* and *Scally* cases, reported with the *Maryland* cases in this volume of AM. NEG. CAS., pages 341 and 369.

1. Reported with the *Massachusetts* cases in this volume, pp. 407, 505, *post*.

The case of *Searle v. Lindsay*, before referred to, well illustrates this. There the plaintiff was employed by the defendants as their third engineer on board their steam vessel. While turning a winch, one of the handles came off, in consequence of the want of a nut or pin to secure it, and the plaintiff was thereby seriously injured. He was, with others, at work at the winch by the orders of the chief engineer, who knew that the instrument was out of order, but was, nevertheless, a competent person for the position he occupied. There was no evidence of personal negligence on the part of the defendants, and it was held that the chief engineer and the plaintiff were fellow-servants, and that, as the defect existed by reason of the negligence of the chief engineer, whose duty it was to see that the machinery was kept in proper condition, the plaintiff could not recover. And, in the concurring opinion of Mr. Justice Williams in that case, the law is briefly but clearly stated that governs cases like the present. He said: "I think there was no foundation for the argument that Simpson, the chief engineer of the vessel, and the plaintiff, stood in any other relation towards each other than that of ordinary fellow-servants. Then, applying the rule of law which is now firmly established, the common employer is not liable to either for an injury sustained through the negligence of the other. In order to take this case out of the ordinary rule, it was contended that here there was negligence on the part of the employers themselves. In order to make that out, there must be reasonable evidence to show that they were to blame, either in respect to their not having provided proper machinery and appliances, or not having retained competent workmen. I do not find any evidence at all of any default in either of these particulars. If the winch was out of order, it was owing to Simpson's negligence. There was no evidence, nor any suggestion, that Simpson was not a perfectly competent engineer." And such was the view of all the judges.

In the case before us, the question, depending upon a diversity of opinion, as to whether the eye-bolt or the hook is the better mode of fastening the brake, is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time, and on so many of its cars, without accident. A master is not bound to change his

machinery, in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant thinks proper to operate such machine it is at his own risk; and all that he can require is, that he shall not be deceived as to the degree of danger that he incurs. *Dynen v. Leach*, 26 L. J. Exch. 221 (1); 1 Redfield on Railways, 521, note.

As to the defective attachment of the hook, it was shown to have been the duty of the employees, Fairbanks, Buckingham and Day, to see that the cars and their appliances were kept in proper and safe repair. Whatever negligence, therefore, may have existed in regard to the arrangement of the brake, and of the defective attachment of the hook thereto, was the negligence of those employees, the fellow-servants of the plaintiff; and there is an entire absence of evidence to show that there was the least negligence on the part of the defendant in the selection and employment of those servants; but, on the contrary, there is the most abundant evidence that such servants were of sufficient competency and skill; nor is there the slightest evidence in the case, that any superintendent or other agent, having control and general direction of the employees, and for whose negligent conduct the defendant would be responsible to the plaintiff, even had knowledge of the defective condition of the brake before the occurrence of the injury. The proof wholly failing in these important particulars, the court below could not have done otherwise than instruct against the plaintiff. The essential proof of the gravamen of the action was wanting, and of course the plaintiff could not recover. The several prayers of the defendant were unobjectionable, and the court was therefore right in granting them. And, as by the granting of the defendant's prayers, the case was taken from

1. In *Dynen v. Leach*, 26 L. J. Exch. 221, it was held that where an injury happens to a servant while in the actual use of machinery or appliances in the course of his employment, of the nature of which he is as much aware as the master, and the use of which is the proximate cause of the injury, he can not, if his own negligence in the use of such machinery be the real cause of his injury, recover against the master where there is no personal negligence on the part of the master, and the fact that the master may have in use in his service machinery or appliances less safe than some others in general use, is not evidence of the personal negligence of the master.

the jury, the plaintiff's prayer, which was rejected, became unimportant.

For these reasons the judgment will be affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY v. STRICKER.

Court of Appeals, Maryland, March, 1879.

[Reported in 51 Md. 47.]

CONDUCTOR ON TOP OF CAR COMING IN CONTACT WITH BRIDGE—NEGLIGENCE—BURDEN OF PROOF.—To entitle the plaintiff in an action against a railroad company, to recover damages for injuries sustained by him, by being carried against the strut of a bridge spanning the defendant's road while in the discharge of his duty as conductor of a freight train then in motion, he was walking on top of a house-car, it is necessary to prove that the company had been guilty of negligence which directly caused the injury, that is to say, that in the relation which existed between the plaintiff and the company, the latter has failed or neglected to perform some duty towards the plaintiff, which was devolved upon it by law; and secondly, it must appear that the plaintiff was not guilty of any negligence on his part, or any want of reasonable prudence and caution to avoid the accident.

DUTY OF RAILROAD COMPANY AS TO MACHINERY AND ROAD-BED.—It is the duty of a railroad company to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities, and it must not expose its employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the employee has a right to presume that the company has discharged these duties.

ERROR TO SUBMIT QUESTION NOT JUSTIFIED BY EVIDENCE—INSTRUCTION—ASSUMPTION OF RISK.—A prayer which in general terms submitted to the jury the question of reasonable care on the part of the railroad company in constructing a bridge with a view to the safety of its employees, and also whether or not the plaintiff (an employee who had been injured while in the discharge of his duty, by being carried against the bridge) had used ordinary care under the circumstances to avoid the accident, is erroneous, as it ignores the distinction between an employee having knowledge of the business and one having no knowledge. The plaintiff must be held to have understood the ordinary hazards attending his employment, and, therefore, to have voluntarily taken upon himself the hazards, when he entered, or when, with that knowledge, he chose to continue in the service of the company. There being no evidence of negligence on the part of the railroad company it was error to submit that question to the jury.

(Syllabus to official report.)

APPEAL from the Circuit Court of Frederick county. The case was removed from the Baltimore City Court on the suggestion and affidavit of the defendant. There was a verdict and judgment for plaintiff for \$5,000. The facts are stated in the opinion. *Judgment reversed.*

ARGUED before BARTOL, CH. J., BOWIE, BRENT, MILLER and ALVEY, JJ.

JOHN K. COWEN and A. H. SYESTER, for appellant.

ALBERT RITCHIE and JOHN RITCHIE, for appellee.

Bartol, Ch. J.—This suit was brought by the appellee to recover for injuries received by being carried against a bridge spanning the appellant's road, while he was on top of a "house-car" in the discharge of his duty as conductor of a freight train. The accident happened on June 6, 1876, in passing under the bridge called "Bull Eye Bridge," which was built by the appellant on a public road about three-fourths of a mile east of Martinsburg.

It appears from the evidence that the appellee entered the service of the company in 1867 as brakeman on freight trains between Martinsburg and Baltimore. In July, 1869, he was promoted to be a conductor of freight trains on the same section of the road and continued in that employment till the time of the accident. In that capacity it was his duty to assist at the brakes.

When the appellee first went upon the road, the house-cars of the company were from nine to ten feet high; about the year 1869 connection with Western roads began to be formed, and higher cars were introduced from the west; the company also began to construct new cars which were ten feet ten inches to eleven feet high, and the Western cars, sometimes used, were eleven and a half feet high. The plaintiff testifies that some of the new cars were on the road while he was brakeman; the number of these were increased and they were in general use after 1872 or 1873. They were constructed with the brakes on top, and to manage the brakes it was necessary to be on the top of the car.

In 1872, the old "Bull Eye" bridge was removed, and a new bridge built, which was of different construction and of about the same height as the old one, that is to say, seventeen feet four inches high, measuring from the railway to the struts or lowermost timbers of the bridge.

On June 6, 1876, the appellee, having in charge a freight

train consisting of twenty-three loaded cars, viz., eighteen gondolas, four hoppers and one of the new house-cars, and also the caboose, was ready to start from Martinsburg at six o'clock in the morning. In order to leave the track clear for an expected passenger train, as was his duty, he took his train upon a siding, or switch, between Martinsburg and the bridge, where he remained till half-past six, when he brought his train on the main track and proceeded on his way. The distance from the bridge to the switch was 200 to 300 yards, from which place the bridge was in full view.

The accident happened in this way: the appellee was assisted by one brakeman, who remained behind to lock the switch; the appellee being specially charged to see that this important duty was performed, held the train waiting till it was done. He was standing on the sixth or seventh car from the rear of the train, looking back to see the brakeman lock the switch, and for his signal; when he saw this, he immediately signaled the engineer to go on, and began to let off the brakes; had let off the brakes as far back as the house-car, which was the last car except the caboose; had got on top of it about the center and was walking toward the brake, for the purpose of letting it off, and then going into the caboose, when he was struck by the strut of the bridge, his back being then turned towards it.

The appellee testified that he had never heard of anyone having been struck by this bridge before he was struck; that no one on the part of the company had ever told or notified him that this bridge was too low; that he did not know its exact height, but supposed that the struts were high enough to clear a man standing on top of such a car as he had. Had never before had occasion to be adjusting the brakes or to be walking on top of a car as he was passing under that bridge. Had been on the siding often before, but had never started from it on his trip, had always started from the station, and that gave him ample time to have the brakes adjusted before he got to the bridge.

Proof was given that it was known to Mr. Wilson, the company's master of road, that the "Bull Eye" bridge was not high enough to allow a man to pass under it standing on top of the new house-cars; and further that there were no signal ropes to warn persons approaching the bridge, such as were used at some of the other bridges.

On the other hand, a number of witnesses, examined by the

defendant, conductors, brakemen and engineers, employed on the same section of the road, testified that this bridge was too low to allow a tall man to pass under it, standing upon a house-car; that this fact was plainly visible and obvious to any one passing under it, and that it was the habit of brakemen and conductors, when on top of a house-car, to stoop or remain seated while passing under the bridge. Two of them, Bierman, the engineer, and Dixon, the brakeman, who were on the same train with the appellee when he was struck, both testify that they had often seen him stoop down when passing under the same bridge. And the appellee himself stated in his testimony that he was down on the gondola car and never thought of the bridge; if he had known how near he was to it he would not have gone on top of the house-car, and if he had seen the bridge would have sat down. He further states that he never made any complaint to any officer of the company of the lowness of the bridge; knew that the bridge which was there before 1872 was too low to allow him to pass under it standing on top of the new house-cars, and always stooped in going under it; had heard that the new bridge was higher, but did not know how much higher; did not know till that morning that he could not pass under it with safety standing on a house-car; might have supposed it was too low, but could not tell it till he was struck.

It appeared in proof also that the appellee lived in Martinsburg, was well acquainted with "Bull Eye" bridge, its position and surroundings, and while in the employ of the company made about thirty trips a month, fifteen each way, and had passed under the bridge over 3,000 times, or nearly 1,500 times after the new or higher cars were generally used.

Other testimony was offered which it is not necessary to repeat. Three witnesses, McGee, Miller and Leonard, employees of the company, testified that they had been struck by the same bridge, but each explained the circumstances causing their accidents, which show that these resulted from their own carelessness and inattention, and each testified that they were caused by their own neglect and want of caution.

Now, the question presented for our consideration is, what are the rules of law applicable to the state of facts disclosed by the bills of exceptions and which have been before stated.

To entitle the plaintiff to maintain the suit it was necessary to prove that the company had been guilty of negligence which

directly caused the injury, that is to say, that in the relation which existed between the appellee and the company, the latter had failed or neglected to perform some duty towards the appellee which was devolved upon it by the law; and secondly, it must appear that the appellee was not guilty of any negligence on his part or any want of reasonable prudence and caution to avoid the accident.

First: As to the alleged negligence on the part of the company? In what did this consist? It was said it was negligent in constructing the bridge so low that a conductor or brakeman could not pass under it in safety, on the top of a house car, where his duty required him sometimes to be. But there is no evidence to support this position; on the contrary, all the proof shows that the employees of the company, and the appellee among them, every day passed under the bridge safely by observing the simple and easy precaution of stooping or sitting down while passing under the bridge.

No negligence can be imputed to the company because the struts of the bridge were not high enough to allow a person to pass under them, standing upright on the top of the cars. *Baylor v. Del. & W. R. Co.*, 11 Vr. (N. J.) 23.

It was not required of the appellee to stand on his feet while passing the bridge; he was in that position, according to his own statement, because his back was turned towards the bridge: "he did not think of it, and did not know he was near it;" but he knew it was there; it was in full view only a few moments before when he started his train from a point only 200 or 300 yards distant.

Nothing is better settled than that "the implied contract between the employer and employee is that the latter takes upon himself all the natural risks and perils incident to the service," *Moran's case*, 44 Md. 292 (1); as expressed by Cock-

1. In CUMBERLAND & PENNSYLVANIA R. R. Co. v. STATE (use of MICHAEL MORAN). 44 Md. 283 (October Term, 1875), minor employee, a fireman on defendant's locomotive, killed by explosion of locomotive, appeal from judgment for plaintiff in the Circuit Court for Allegheny county, the rulings by the Court of Appeals (per opinion by ALVEY, J.), are stated in the syllabus to the official report as follows:

"In an action against a railroad company, to recover damages for the death of an employee, who was killed by the explosion of a locomotive engine belonging to the defendant, while employed thereon as fireman, it was shown on the part of the plaintiff that the engine had been purchased in 1869 as a second-class engine, then out of use, and that the agents of the defendant, entrusted with the power of making the purchase failed to as-

burn, Ch. J., in *Clarke v. Holmes*, 7 H. & N. 943: "When a servant enters upon an employment, he accepts the service sub-

certain the age of the engine, the use to which it had been subjected, or its condition further than by an examination of its appearance as then presented. It was proved that at the time of the explosion, resulting in the death in question, the engine was in a very defective condition, that its dome was cracked, and the plates of iron of which the boiler was composed had from some cause lost their tenacity and power to resist an ordinary pressure of steam, and that the defective condition of the engine had been brought to the knowledge and attention of the employees of the defendant whose business it was to repair it.
Held:—

"1st. That upon this proof there was evidence legally sufficient upon which the court below was justified in submitting the case to the jury, although on the part of the defendant it was proved that every precaution was taken, and that the engine was repaired, and was supposed to be in a good, safe condition.

"2nd. That it was for the jury to determine upon the real state of the facts as they found them to exist, whether there was negligence on the part of the defendant.

"When a servant engages for the performance of services for compensation, it is implied in the contract as between himself and the employer unless otherwise stipulated, that he takes upon himself all the natural risks and perils incident to the service.

"Where the nature of the service is such that as a natural incident to that service, the servant must be exposed to the risk of injury from the negligence of other servants of the same employer, or from the use of dangerous machinery, such risk is

among the natural perils which the servant assumes upon himself, as between himself and his master; and consequently there is no liability of the latter to the former for injuries resulting from the negligence of other servants in the same common employment, or the use of such machinery.

"If, however, the master has wrongfully and unjustifiably enhanced the risk to which the servant is exposed, beyond the natural risk of the employment, which must be presumed to have been in contemplation when the employment was accepted, as by knowingly or negligently employing incompetent or unfit servants, or supplying defective machinery—in such cases, the master may be held liable for the consequences of such negligence.

"The danger contemplated on entering into the contract must not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. In the case as above stated, it was further *held*:

"1st. That as the general superintendent, assisted by the master of machinery, made the purchase of the locomotive engine in question, they must be taken as the representatives of the defendant, and any omission or neglect committed by them must be regarded as that of the defendant and for which it is liable.

"2nd. That these agents thus entrusted with the duty of purchasing the engine are not to be regarded as fellow-servants of those operating it.

"3rd. That it does not follow, however, because the master of machinery acted in a distinct and special em-

ject to the risks incidental to it" (1). The rule is well stated in Wharton on Negligence, § 214: "An employee who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain."

Some stress has been laid by the appellee's counsel, on the fact that when the appellee entered the service of the company in 1867, and for some years afterwards, the cars in use were of such size and structure that no danger whatever was incurred by standing on the top of them in passing under the bridge, and that afterwards higher cars were introduced, upon which a person could not with safety stand erect while passing under the bridge, and this change is relied on as an unwarrantable

ployment in making the selection of the engine, that, therefore, he was not a fellow-servant with those operating it, in his ordinary employment as master of machinery.

"4th. That whether he be regarded as fellow-servant or as holding a representative position, if he was unskilful and incompetent for the position he occupied, to the knowledge of the defendant, the latter would be liable for any injury that resulted from his incompetency or want of skill.

"5th. That it was the duty of the defendant to keep the engine in such proper repair as not to increase the risk that was contemplated by the servant at the time he entered the service, and if by reason of the want of skill, or from other incompetency of the master of machinery that duty was not discharged, the defendant would be liable for the consequences.

"6th. That whether the master of machinery was unskilful or otherwise incompetent for his position, or whether the injury sued for was in any manner the result of his unskilfulness or other incompetency, and not of the want of care on the part of the deceased were questions

for the jury to determine upon the facts of the case."

In CUMBERLAND & PENNSYLVANIA R. R. Co. v. STATE (use of HOGAN), 45 Md. 229 (1876), engineer killed by explosion of locomotive, the accident being the same as that by which Moran, the fireman, was killed (see the Moran case, 44 Md. 283, reported in preceding paragraphs), judgment for plaintiff for \$8,000 was affirmed. Following the rulings in the Moran case, *supra*.

1. In CLARKE v. HOLMES, 7 H. & N. 937, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. The defendant was held liable for the injury. This appears to affirm Holmes v. Clarke, 6 H. & N. 349.

increase of risk and danger to the appellee after he had entered the service of the company.

Many cases have occurred in which it has been held to be the duty of the employer to give notice or warning to the employee of increased risk or danger to which he may be exposed, where a change has been made in the nature of his duties, and a failure to give such notice or warning has been held to render the employer liable for the consequences; but this principle has no application to the present case. It is applicable where the increased risk or danger to the employee arises from causes hidden and secret, and such as would reasonably escape his observation.

In this case the introduction and use of the new house-cars commenced as early as 1872, was well known to the appellee, and with that knowledge he continued in the service of the company for the space of four years. So that in this respect, the case stands on the same ground as if the condition of things which existed at the time of the accident was the same as when the appellee first entered the service. The bridge was, during all this time, a permanent structure visible to the appellee, and the new cars were in daily use by him during that period.

"If a man chooses to accept the employment, or continue in it, with the knowledge of the danger, he must abide the consequences, so far as any claim against the employer is concerned." *Woodley v. M. D. R'y Co., L. R., 2 Exch. Div. 389 (1).*

1. In *WOODLEY v. MET. DIST. R'Y Co., L. R. 2 Exch. Div. 384*, it appeared that a railway company employed a contractor to do work upon a side of a dark tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its approach. Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a look-out

What, then, was the legal duty of the company? This is well stated in the appellee's brief: "It was the duty of the company to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities; and it must not expose its employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the employee has a right to presume that the company has discharged these duties." This rule is supported in O'Connell's case, 20 Md. 212, 15 Am. Neg. Cas. 341, *ante*; Scally's case, 27 Md. 589 (1); Wonder's case, 32 Md. 419, 15 Am. Neg. Cas. 352, *ante*.

Let us apply it to the present case. As we have before said, the contract of service by the appellee was made while the bridge of 1872 was standing, and the new cars were in use, or, which is the same thing, he voluntarily continued in the service after that time, with a full opportunity of knowing the risk to which he was exposed. In constructing the bridge all that was incumbent on the company was to build it of sufficient height to enable the employees, in the discharge of their duties, to

man or altering the usual mode of conduct in the traffic. Held, that the plaintiff, having continued the work, with full knowledge of its dangerous nature, had no remedy against the company.

1. In CUMBERLAND COAL & IRON Co. v. SCALLY, 27 Md. 589 (April Term, 1867), appeal by defendant from verdict and judgment for plaintiff, the gravamen of the action was that certain injuries were sustained by plaintiff while employed as a laborer by defendant, in the course of which service, in descending a heavy grade of defendant's railroad, in a train of gondola or open cars, with other laborers, under the direction of a conductor, plaintiff was thrown out and severely wounded. Judgment was *affirmed*. The Court of Appeals followed the ruling in the O'Connell case, 20 Md. 222, 15 Am. Neg. Cas. 341, *ante*, on the question of liability

of railroad companies for injuries sustained by employees, viz.:

When several persons are employed in the same general service, and one is injured by the carelessness of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible. The liability to injury of one, from the carelessness of his fellows, is but an ordinary risk against which the law furnishes no protection, but by an action against the wrongdoer. And though it is the duty of a railroad company to exercise all reasonable care in procuring, for its operation, sound machinery, and faithful and competent employees, and though it is liable to its servants for the neglect of this duty; yet, after it has procured such machinery and employees, it is not liable to a servant for the injuries occasioned by the neglect of any of its co-servants, employed in the same general business of operating the road.

pass under it in safety, by the use of ordinary care and prudence; and there is no evidence in the case that this duty was not performed. In our opinion the ninth prayer of the appellant states correctly the duty and obligation resting upon the company in the construction of the bridge, and as there was no evidence of any negligence on the part of the company in this respect the ninth prayer ought to have been granted, which denied to the appellee the right to recover, there being a failure of evidence to support a material part of his case (1).

We think the evidence tended strongly to prove that the accident was caused by a want of reasonable care on the part of the appellee; but we do not rest our decision on this ground. In the midst of his preoccupation with his duties, he might be excusable for losing sight of the danger menacing him at the moment. But this peril was one incident to the employment, in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which he had an opportunity to ascertain, and the risk of which he assumed.

Having stated our opinion upon the rules of law applicable to the case, which deny to the appellee the right to recover, it is not necessary to notice particularly the several prayers contained in the record. The first prayer of the appellee submitted to the jury, in general terms, the question of reasonable care on the part of appellant in constructing the bridge with a view to the safety of its employees, and also whether the appellee had used ordinary and reasonable care, under the circumstances, to avoid the accident. Such an instruction would, in some cases, be correct, but as was said by Ellsworth, J., in *Hayden v. Smithville M'f'g Co.*, 29 Conn. 548, 557, 13 Am. Neg. Cas. 669, when speaking of a general instruction of this kind, "it ignores the clear distinction between an employee having knowledge of the business and one having no knowledge." * * * "The employee here was acquainted with

1. The ninth prayer of the defendant was as follows: "That the only obligation upon the defendant to its employees engaged in running trains over said road, in the erection and construction of said bridge, was to erect and construct it of such a height, that the employees of said defendant, in the discharge of their duties, could pass under said bridge in safety by the use of ordinary care and prudence; and that the plaintiff has offered no evidence to the jury that said bridge was so negligently constructed that said employees could not pass thereunder in safety in the discharge of their duties, by the use of ordinary care and prudence on their part."

the hazards of the business in which he was engaged. * * * He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself the hazard when he entered, or when, with that knowledge, he chose to continue in the service of the company."

There being in this case no evidence of negligence on the part of the company, it was error to submit that question to the jury.

Judgment reversed.

CONDUCTOR OF FREIGHT TRAIN FATALLY INJURED IN COLLISION — RELATION OF PARTIES — EVIDENCE — STATUTE — DAMAGES. — In **BALTIMORE & OHIO R. R. CO. v. STATE** (use of *JEANETTE WOODWARD*), 41 Md. 268 (*October Term, 1874*), judgment for plaintiff for \$8,000 in the Circuit Court of Frederick County, was *reversed*, the rulings (as per opinion by *MILLER, J.*) being stated in the syllabus to the official report as follows:

"W., a conductor of a freight train on the B. & O. R. R., had his leg crushed by a collision with the train immediately following his. The collision occurred near the Point of Rocks about four o'clock in the morning. As soon as practicable after the accident, the injured man was placed on the tender of the nearest engine and carried to the Point of Rocks, accompanied and attended by his friend, the conductor of another train, who stopped with him at that station. As soon as he arrived there, the agent of the railroad company was aroused, the leg of the injured man was bound up with twine to stop the bleeding, a mattress procured on which he was taken to a hotel and stimulants administered to him. The nearest physician was immediately sent for, and arrived in a short time; he removed the twine, put on a field tourniquet, bandaged the leg and placed a board under it to keep it in position. At this time he had bled freely, and his pulse was feeble; but he subsequently rallied and the physician stated he was in a fair way to recover, when he was put in the baggage car of the next eastern-bound passenger train, which arrived sometime after seven of the same morning, to be taken to Frederick, a distance of thirteen and a half miles, where his relations and friends lived. The same party who had remained with him attended him in the transit to Frederick, where he arrived in about two hours. On his arrival he was in a dying condition from hemorrhage, which occurred during the passage, and died shortly thereafter. By a rule of the railroad company, an employee had no right to claim compensation from the company 'when disabled by

sickness or other cause;’ and any allowance they might make to him in such case was to be ‘as a gratuity only.’ In an action for damages against the railroad company by the widow of the deceased, it was *held*:

“1st. That the duty and responsibility of the company to take care of the injured man ceased when he was thus attended to, and placed at a hotel in charge of a physician.

“2d. That the injured man, in relation to his transportation from the Point of Rocks to Frederick, occupied the position of a stranger to the company, in like condition. They were not bound to carry him gratuitously, nor to procure a physician, or any one to accompany and attend to him on the way.

“A party will not be allowed to impeach the credibility of his own witness.

“Where the record transmitted to the Court of Appeals shows that an objection was raised to the admissibility of evidence offered generally in a case tried before a jury, and was overruled or sustained by the court, the appellate court must assume that the testimony was admitted or rejected by that court because it was pertinent and relevant or otherwise, to the issue made by the pleadings. In such case it necessarily appears by the record that the point was decided by the court which tried the cause, and it may, therefore, be examined and decided by the Court of Appeals.

“By the custom and regulations of a railroad company, trains in convoy were equipped, each with one engineman, one fireman, one conductor and one brakeman. The conductor of a train in convoy, on such road, had his leg crushed by collision with the train immediately following his, and died shortly thereafter. In an action against the railroad company by the widow of the deceased to recover damages for his loss, it was *held*:

“That if he had knowledge of this custom and practice at the time of his employment and afterwards, and with such knowledge continued for eight or nine months in his employment, as conductor on trains in convoys thus equipped, and also knew that the train following his on the night of the collision was equipped in the same manner, such knowledge on his part would prevent a recovery on account of any supposed deficiency in equipment in this respect.

“In an action against a railroad company, by a widow, to recover damages for the killing of her husband by a collision of trains of the defendant, he being at the time in the employ of the defendant, the jury, in assessing the damages, if they find for the plaintiff, must estimate the reasonable probabilities of the life of the deceased, when injured, and give the plaintiff such pecuniary damages as will compensate her for losses already suffered as the direct consequence of her husband’s death, and also for the prospective losses she will

suffer as the direct consequence of such death during the period, the jury, under all the circumstances, shall deem to be the probable duration of her life."

**NOTES OF MISCELLANEOUS CASES OF INJURIES TO RAILROAD
EMPLOYEES DECIDED IN MARYLAND.**

Brakeman riding on free pass killed in collision — Liability of railroad company as carrier.

In *STATE* (use of *KATE ABELL*, widow, etc.) *v. WESTERN MARYLAND R. R. Co.*, 63 Md. 433, (October Term, 1884), judgment was *reversed*, the case being sufficiently stated in the syllabus to the official report, as follows:

"A. was employed by a railroad company as brakeman on a train running daily, Sundays excepted, from U. to B. and back. From Saturday evening until Monday morning this train remained at U. A. was employed and paid by the day, but was not paid for Sunday unless required for duty on that day. On Saturday evenings, with the permission of the conductor of his train, and after his work for the day was ended, he was in the habit of leaving U. on another train bound for B. with the intention of spending Sunday in B. with his family, and returning to U. in time to go out with his own train on Monday morning. On such occasions he was permitted to travel free of charge on a pass which the conductor of his train held for himself and crew. On a Sunday while thus riding to Baltimore on the conductor's pass in the caboose car of a freight train of the company, A. was killed by a collision with another train caused by the negligence of the employees of the company. In an action for damages brought against the company by the wife of the deceased in the name of the State, it was *held*:

"1st. That A. at the time of the collision was not acting in the service of the company, but was substantially a stranger, and entitled to all the privileges he would have had if he had not been an employee.

"2nd. That the fact that he was riding in the cars upon an employee's pass did not alter the case.

"When a carrier undertakes, without any special contract, to carry a passenger gratuitously, the passenger is entitled to the same degree of care as if he had paid his fare."

Brakeman killed by smoke and gas in tunnel — Assumption of risk.

In *BALTIMORE & POTOMAC R. R. Co. v. STATE* (use of *JOSEPH ABBOTT*), 75 Md. 152 (January Term, 1892), the case is stated in the syllabus to the official report (the opinion *reversing* judgment for plaintiff being rendered by *ALVEY*, Ch. J.) as follows:

"Where a brakeman on a freight train of a railroad company, was killed while so employed, by the smoke and gas in a tunnel which was insufficiently ventilated, and the proof showed that the deceased accepted and continued in the employment of the railroad company with full knowledge of the condition of the tunnel and of the risk of the work therein, he could not, if death had not ensued, have recovered for an injury sustained by reason of the condition of the tunnel, and consequently, under section 1 of article 67 of the Code, his father would not be entitled to recover for his death.

"If a person chooses to accept employment, or continue in it, with knowl-

edge of the danger attending it, he must abide the consequences so far as any claim against the employer is concerned.

"Speculation as to how or from what cause the accident occurred cannot be allowed to stand for proof, or be made the basis of a verdict in favor of the party upon whom the burden of proof lies. There must be evidence upon which the jury can reasonably and properly conclude that the death was produced by some negligence or wrongful act of the defendant."

Brakeman injured while ascending top of car — Disobeying rules of company.

In *GORDY v. NEW YORK, PHILADELPHIA & NORFOLK R. R. Co.*, 75 Md. 297 (January Term, 1892), judgment for defendant was *affirmed*, the case being stated in the syllabus to the official report as follows:

"In an action by a rear brakeman or flagman of a freight train, to recover for injuries he sustained in going from the inside of the car to the top by ladder strips, evidence to show that it was customary for the rear brakeman or flagman to ride inside of the rear car is inadmissible, the rules of the company, with which he was furnished, requiring that the brakeman must not leave his brakes while the train is in motion, nor take any other position on the train than that assigned him by the conductor, and declaring that the post of the rear brakeman or flagman is on the last car in the train, which he must not leave except to protect the train.

"An employee, when he enters the service of his employer, and accepts the book of rules prescribing his duties and the manner of performing them, obligates himself to observe and conform to such rules, according to the plain terms thereof, and not according to what may have been a customary practice among other employees regardless of the express requirements of the rules."

Repairman riding on hand-car injured in collision with "extra" train.

In *PENNSYLVANIA R. R. Co. v. WACHTER*, 60 Md. 395 (1883), it appeared that plaintiff was a repairman in defendant's employ, and while going down the track on a hand-car, on a very foggy morning, to surface up the track, was run into by an extra train coming in an opposite direction at a rapid speed without any warning, and was permanently injured by the collision. Plaintiff knew that it was the practice to run such extra trains without previous knowledge. *Held*, that plaintiff assumed the risks, and the railroad company was not liable for the injuries sustained. Judgment for plaintiff for \$4,416 was *reversed*, without awarding new trial.

Laborer in railroad shop injured by steam hammer.

In *HANRATHY v. NORTHERN CENTRAL R'y Co.*, 46 Md. 280 (1876), where a laborer in defendant's workshops while engaged in putting flues or pipes under a steam hammer was injured by one of his hands being crushed by the hammer, the work being done under the direction of the foreman and another employee in immediate charge of the hammer, judgment for defendant was *affirmed*. It was held that the person in charge of the hammer was a co-employee of the plaintiff, for whose negligence, if any, defendant would not be liable; that if there was any defect in the hammer the plaintiff, who had worked about two months in the shops, had knowledge thereof, and, not objecting to work on the hammer, he assumed the risk.

Teamster run over and killed—Defective road-bed.

In PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co. v. STATE (use of SARAH E. BITZER et al.), 58 Md. 372, it appeared that Samuel Bitzer was the driver of a car in use on defendant's road (the said driver being in the employ of another railroad using defendant's road), and that while driving said car in course of his employment he was run over and killed by said car in consequence of a defect in the road-bed. On the trial there was a verdict for plaintiff. On appeal judgment was *affirmed*. The points decided were generally on questions of practice. On the question as to effect of agreement between owners of connecting railroads upon the rights of strangers to the agreement it was *held* that:

"Whatever effect an agreement between the several companies owning connecting lines of railroad, may have upon the parties thereto, it cannot have any upon strangers to it, nor alter or change the relations of either of them toward third parties, nor have the effect of making those who were employed and paid wages by either of the contracting parties, the co-employees of the agents and workmen of the other parties, or make the others liable either severally or jointly for any loss or damage caused by the neglect of any one of them, even were the agreement silent in this respect.

"Where an injury to the employee of one of said companies occurs on the road of another of said companies, and is caused by the imperfect condition of said road, the principle that every employee assumes the risk of the negligence of his co-employees, is not applicable to him."

Steamship employee injured on pier—Defective steps.

In BALTIMORE & OHIO R. R. Co. v. ROSE, 65 Md. 485 (April Term, 1886), it appeared that plaintiff was a steward on a steamship which was lying at a pier owned by the defendant railroad company, and that while descending a stairway on a railway trestle adjacent to the pier, plaintiff fell by reason of alleged broken condition of the steps. Plaintiff recovered a verdict and judgment, but the same was *reversed* for erroneous admission and rejection of certain evidence, and the granting and refusal to grant certain prayers of plaintiff and defendant.

**STATE OF MARYLAND (USE OF ISABELLA HAMELIN
AND JOHN NICHOLAS HAMELIN AND THEODORE
HAMELIN, BY THEIR NEXT FRIEND, ISABELLA HAME-
LIN) V. WILLIAM T. MALSTER AND WILLIAM B.
REANEY, TRADING AS MALSTER & REANEY.**

Court of Appeals, Maryland, November, 1881.

[Reported in 57 Md. 287.]

**BRIDGE LABORER FATALLY INJURED BY FALL FROM STAGING
— CONTRIBUTORY NEGLIGENCE — EVIDENCE — BURDEN OF
PROOF.**—H., an employee of M. & R., bridge builders, in the course of his employment as a laborer working on Calvert street bridge in the city of Baltimore, received injuries from a fall, which resulted in his death.

In an action against M. & R. to recover damages, it appeared that the accident was occasioned by the want of ordinary care and prudence on the part of H. and his fellow-workmen, and that H. contributed to his misfortune by his own want of caution for his safety; and that there was no evidence of want of reasonable care and diligence on the part of M. & R. in procuring for the work suitable machinery and appliances, and competent superintendents and co-laborers, and that H. was not exposed to risks beyond those incident to the employment, and which were in contemplation at the time of the contract of service. *Held*: that there was no sufficient evidence of negligence on the part of M. & R. (the whole *onus* of proof being on the plaintiffs) to sustain the action against them.

RECORD — IMMATERIAL MATTER — DIVISION OF COST.— Where, by agreement, a large amount of matter was unnecessarily incorporated in the record sent to this court, in disregard of the fifth rule, it was adjudged that each party pay one-half of the cost of printing the transcript.

(Syllabus to official report.)

APPEAL from the Court of Common Pleas on verdict and judgment for defendants. The case is stated in the opinion. *Judgment affirmed.*

The cause was argued before BARTOL, CH. J., GRASON, ALVEY, ROBINSON, IRVING and MAGRUDER, JJ.

W. H. HARRIS and C. J. BONAPARTE, for appellant.

J. E. SEMMES and S. T. WALLIS, for appellees.

Alvey, J.— This action was brought to recover for the death of Theodore Hamelin, alleged to have been caused by the negligence of the defendants. The defendants are bridge builders, and were, at the time of the accident complained of, engaged in constructing what is known as the Calvert street bridge, over Jones Falls, in the city of Baltimore. The bridge is a heavy iron structure, and, in putting it together, it required strong manual force as well as the use of mechanical appliances. The deceased was employed by the defendants as one of the laborers in the construction of this bridge at the time of his death.

With the declaration was filed a statement of the particulars of the claim, and the grounds upon which it was made. In that statement it is alleged that the accident was "caused by the negligence of the defendants, in selecting one Dudrow, an unfit person for such appointment, to be a foreman in said work; and in failing to provide sufficient appliances to secure the safety of their workmen; and in the general control and management of the said work by themselves; or by one or

more of the causes aforesaid." The case was tried upon the general issue, that the defendants did not commit the wrong alleged. And, under the instruction of the court, the verdict was for the defendants.

The evidence shows that the deceased was not an experienced bridge builder, but that his vocation in life had been that of a mariner. He was employed as an ordinary laborer, at ordinary wages, and had been at work on the bridge about two weeks previous to his death. He was at work under Curran, the foreman or superintendent of the work, who was an experienced and skilled bridge builder; the defendants not being constantly at the work themselves, and not being there upon the occasion of the accident. There were two other men employed at the time on the work, named Dudrow, who were skilled workmen, and one of them, Parker Dudrow, was acting as leader or director of the gang of hands engaged in the particular work, in the doing of which the accident occurred; though it appears he had no special delegation of authority as foreman. In regard to these facts there is no controversy whatever; they are proven mostly by the evidence adduced on the part of the plaintiff.

The way in which the work was done, in the doing of which the accident occurred, as shown by the evidence, was this: The arches of the bridge were constructed of heavy iron segments, of about 3,600 pounds each, and these segments were placed in position in the arches by the use of a derrick. But in order to put them in position to be raised by the derrick, they had to be moved along a gangway, in the centre of the scaffolding or framework of the bridge, on a roller or buggy, as it is called, and thence to the edge of the scaffolding on greased iron bars or rails, where the segments were to be raised and placed in the arch. There was no flooring on this scaffolding or framework, but loose planks were provided and used to make footways for the men over the scaffolding to enable them to work. It is shown that there were some 8,000 feet of these planks provided and placed upon the scaffolding for this use; each plank being sixteen feet long, twelve inches wide and three inches thick. When the segments were pushed to the end of the greased rails, they were then tilted or canted from the ends of the rails to put them in position to be raised by the derrick, and this was done by manual force. In order to effect this move, a plank was placed in front of the segment

upon which the men could stand while engaged in canting the segment. This plank should have rested flatly on the cross timbers; but in canting the segment upon the occasion when the accident happened, it was allowed to rest upon the greased rails. In this particular instance, moreover, the plank used had been sawn short some four feet, and it was too short for the purpose, being only ten or twelve feet long. Some fourteen of the segments had been put in place, and the same mode of proceeding had been adopted in reference to them all, except in the use of the short plank, and the allowing it to rest on the greased rails instead of the timbers. In placing the first two or three segments in position, Curran gave personal supervision, and directed, in those instances, the withdrawal of the greased rails after the first tilt thereupon of the segments, and that the plank be placed on the cross timbers. He gave no special direction, however, that this same precaution should be observed in all subsequent cases of placing the segments. In placing these first segments in position, Hamelin, the deceased, was present and co-operated as one of the laborers; but afterwards, the hands were divided into two gangs,—the one being placed at the derrick, and the other assigned to the moving and handling the segments on the scaffolding; and Hamelin was placed with the gang at the derrick, under the immediate direction of Curran. When the fifteenth segment was moved to the place where it was to be tilted or canted the second time, in order to be put in position to be moved by the derrick, call was made for assistance, and Hamelin was directed by Curran to go and give assistance in turning the segment; and when he reached the scene of operation, the short plank had been placed in position in front of the segment resting upon the greased rails, and the men had taken their positions thereon, preparatory to a united effort to turn the segment into position. He took position also on the plank; and in the lateral pressure upon the plank in the effort to turn the segment, the plank slipped upon the rails, and several of the workmen were precipitated to the falls below, a distance of about forty feet, and among these was Hamelin, who came to his death thereby.

With respect to these facts there is no conflict or dispute whatever; and it is therefore clear that the immediate cause of the accident was the incautious use of the short plank on the greased rails, while making the effort to turn or cant the seg-

ment for the derrick, instead of a plank of proper length resting solidly on the timbers of the scaffolding or framework of the bridge.

Upon the whole evidence the court below was asked by the plaintiff to instruct the jury in accordance with ten prayers propounded; but the court refused them all, and, at the instance of the defendants, instructed the jury: First: That there was no evidence in the cause of any such negligence on the part of the defendants in discharge of their legal obligations to the deceased as would entitle the plaintiff to recover under the proceedings. Second: That, upon the undisputed evidence, it was apparent that the deceased directly contributed to the happening of the accident by his own want of ordinary care and prudence; and, Third: That, upon the undisputed evidence, it was apparent that the accident was the direct result of the want of ordinary care and prudence on the part of the deceased and his fellow-workmen, in doing the work on which the accident occurred; and, therefore, the plaintiff could not recover.

These propositions all resolve themselves into this, that there was no sufficient evidence of negligence on the part of the defendants to afford the right of action against them, though there was plain and undisputed evidence of the want of ordinary care and prudence on the part of the deceased and his co-laborers. And in reviewing this ruling of the court below and determining whether it be correct or not, we must first make reference to the settled principles of law applicable to the case.

All the cases, English and American, fully agree in the general proposition, that where a servant engages to perform certain service for compensation, it becomes an implied part of the contract that he will take upon himself, as between himself and the employer, all the natural risks and perils incident to the work, whatever the nature of that work may be; and if the nature of the work be hazardous, involving the necessity for great care and caution on the part of the servant for his own protection against injury, the presumption of law is, that he fully understood the nature of the work, and that his compensation was fixed with reference to the risks and perils of the service undertaken by him. And if, from the nature of the service to be performed, the servant must or may be exposed to risk of injury from the negligence of other servants of the same employer, engaged in the same common employment,

though it may be in different grades or departments of it, such risk is one of the natural perils which the servant takes upon himself, as between himself and the employer, and, therefore, for any injury sustained from such cause, that is to say, the negligence of fellow-servants, he can have no right of action against the master. The servant, however, does not engage against the negligence or malfeasance of the master himself; and hence the master is bound to use due and reasonable diligence, having respect to the nature of the service, to provide the proper materials, appliances, and instrumentalities for doing the work, and also to use due diligence and care in the selection and employment of competent and careful fellow-servants for the particular work or service to be performed. Nor is the master justified in knowingly or negligently exposing the servant to any extraordinary or unreasonable peril in the course of the employment, against which the servant, from the want of knowledge, skill, or physical ability, could not, by the use of ordinary care and prudence, under the circumstances of the case, guard himself. For the violation of duty in these respects by the master, whereby injury is sustained by the servant, the master is justly liable. These principles are laid down in a great number of adjudged cases, and have been explicitly enunciated by this court. *Wonder's case*, 32 Md. 411, 15 Am. Neg. Cas. 352, *ante*; *Hanrath's case*, 46 Md. 280, 15 Am. Neg. Cas. 374, *ante*; *Hutchinson v. R'y Co.*, 5 Exch. 343; *Wigmore v. Jay*, 5 Exch. 354; *Roberts v. Smith*, 2 H. & N. 213; *Williams v. Clough*, 3 H. & N. 258 (1); *Hough v. R'y*

1. In *HUTCHINSON v. YORK, N. & B. R'y Co.*, 5 Exch. 343, where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants, it was held that no action was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

In *WIGMORE v. JAY*, 5 Exch. 354

(Exch. of Pleas, 1850), it appeared that defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. Held, that no action could be maintained against the defendant under the 9 and 10 Vict. c. 93, there

Co., 100 U. S. 213, 217; Whart. Negl., §§ 209-217, and Cooley on Torts, pp. 543, 545, where the cases have been carefully collected, and the results of them stated.

All the cases agree in holding that there is no obligation on the part of the master to give his own personal supervision to the execution of the work; but that he may delegate that power to a superintendent or foreman. And it is held by all the English cases, and by a decided preponderance of those of this country, that such superintendent or foreman is a fellow-servant within the rule, and that the omission or negligence of such superintendent or foreman is among the incidents of the service, and the risk of which the servant assumes upon himself, as between himself and the master, when he enters the employment. Consequently, for any injury to the servant, caused by the omission or neglect of the superintendent or foreman, the master is not liable to the servant, provided the master has not been negligent or careless in the selection of such foreman or superintendent. It is said by Judge Cooley, in his work on Torts, in treating of the subject, at page 544, "that it can not be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible therefore to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class." The cases in which it has been held that the superintendent or manager is a fellow-servant within the rule which exonerates the master are quite numerous, and it is not necessary that we should do more than give reference to some of them. *Wonder's case*, 32 Md. 411, 15 Am. Neg. Cas. 352, *ante*; *Wigmore v. Jay*, 5 Exch. 354; *Wiggett v. Fox*, 11 Exch. 832; *Brown v. Accrington Cotton, etc., Co.*, 3 H. & C. 513; *Searle v. Lindsay*, 11 C. B., N. S., 429; *Lovegrove v. R'y Co.*, and *Gallagher v. Piper*, 16 C. B., N. S., 669; *Murphy v. Smith*, 19 C. B., N. S., 361; *Feltham v. England, L. R.*, 2 Q. B. 32; *Howell v. Steel Co., L. R.*, 10 Q. B. 62 (1); *Warner v. Erie R. Co.*, 39 N. Y. 468; *Malone v.*

being no evidence that the foreman was an improper person to employ for that purpose.

general, liable to his servant for damages resulting from the negligence of a fellow-servant, in the course of their common employment.

1. In *WIGMORE v. JAY*, 5 Exch. 354, it was held that a master is not, in

In *WIGGETT v. FOX*, 11 Exch. 832, it was held that a master is not responsi-

Hathaway, 64 N. Y. 5; *Lawler v. R'y Co.*, 62 Me. 463; *Blake v. R'y Co.*, 70 Me. 60.

To the general rule, however, there is this qualification or exception, that where the middle-man or superintendent is entrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, there the master may be liable for the omissions or neglect of the manager or

ble to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, but this rule does not hold where the person doing the injury is not a person of ordinary skill and care.

In *BROWN v. ACCRINGTON COTTON SPINNING & MFG. CO.*, 3 H. & C. 511, employee injured in mill alleged to be caused by negligent construction of building, it was held that defendants were not liable unless personal negligence was proved against them, or a person acting under their orders, in giving directions as to the work of construction or in the employment of an incompetent person to do the work, with knowledge of the latter's incompetency.

See also similar points in *Searle v. Lindsay*, 11 C. B. N. S. 429, and *Allen v. New Gas Co.*, L. R., 1 Exch. Div. 251.

In *ROBERTS v. SMITH*, 2 Hurl. & N. 213 (Exch. Ch., 1857), the declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable or unnecessary risk or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which,

for want of such precautions, was rotten and unsafe, which the defendant knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke and the plaintiff fell to the ground. Pleas: 1. Not guilty. 2. Traverse of employment on the terms alleged. At the trial it was proved that the defendants had employed a laborer to erect the scaffold. The materials for the scaffold were in bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him not to break any more, that the putlogs would do very well. The laborer used such as he thought sound. One of the putlogs so used having given way, the scaffold fell, and the plaintiff was injured. On this evidence, the judge at the trial directed a nonsuit. Held, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants. New trial was granted on the ground that the evidence appeared to show personal interference and negligence of the master.

In *WILLIAMS v. CLOUGH*, 3 H. & N. 258, the declaration stated that defendant was possessed of a granary, and a ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that plaintiff was a servant for hire of defendant; that defendant, knowing the premises, wrongfully and deceitfully ordered plaintiff to carry corn up the ladder into the granary; that plaintiff, believing the latter to

superintendent in respect to those duties. If the master relinquishes all supervision of the work, and entrusts not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials, machinery, and other instrumentalities necessary for the service to the judgment and discretion of a manager or superintendent, in such case the latter becomes a vice principal, and for his omissions or negligence in the discharge of those duties, the principal will be liable. *Murphy v. Smith*, 19 C. B., N. S., 361 (*supra*); *Malone v. Hathaway*, 64 N. Y. 5; *Wharton on Negligence* (1st ed.), § 229. As an example of this exception to or qualification of the general rule we may refer to the case of *Moran*, 44 Md. 283, 15 Am. Neg. Cas. 365, *ante*, where the power to select and purchase a locomotive engine was delegated by the defendants to their general superintendent and

be fit for use, and not knowing the contrary, did carry corn up the ladder into the granary, and by reason of the ladder being unsafe he fell from it. Held, that the declaration, without an averment that plaintiff had no notice that the ladder was unsafe, was sufficient.

In *LOVEGROVE v. LONDON, B. & S. C. R'y Co.*, 16 C. B. N. S. 669, where a laborer was employed to do ballasting for a railway company and was injured by the negligence of a laborer employed in laying tram-plates for the same company, it was held that the laborers were engaged in a common service, and that the company was not liable for injury to one caused by the negligence of the other.

In *GALLAGHER v. PIPER*, 16 C. B. N. S. 669, where plaintiff, a scaffolder in defendants' employ, was injured by the negligence of defendants' general manager, it was held that defendants were not liable.

In *MURPHY v. SMITH*, 19 C. B., N. S., 361 (Com. Pl., 1865), it was held that to render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be

shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment. The plaintiff, in this case, was a boy sixteen years of age, employed in defendant's match factory, and while at work was injured in an explosion of chemical substance. The negligence charged was that of defendant's foreman, but the evidence failed to establish that the person in charge of the chemicals at the time of the explosion had any authority from defendant to act as foreman. Such person was merely a fellow-servant of the plaintiff for whose negligence defendant was not responsible.

See similar point in *Feltham v. England*, L. R., 2 Q. B. 32.

In *HOWELL v. LANDORE STEEL CO.*, L. R. 10 Q. B. 62, where a minor employee was killed by an explosion in a colliery, caused by alleged negligence of the manager, the latter being appointed in pursuance of the statute, it was held that the parties were fellow-servants, and that the company was not liable for the death of the employee.

their master of machinery, and for the negligence of those agents in the discharge of that duty, the defendants were held liable for the death of a fireman employed on the engine so purchased. Many other instances might be referred to if it were necessary.

Now, with these well-established legal principles and distinctions in view, we may proceed to a more direct consideration of the case, with reference to the facts in proof. And, in the first place, it is important to bear in mind that the whole *onus* of proof is on the plaintiff. It is incumbent upon him to show affirmatively all the elements of the right to recover. Unless the court can see that there is such evidence in the cause as will *fairly* support a verdict, if the jury should find it credible and proper to be made the basis of their finding, it becomes an imperative duty of the court to instruct the jury to find their verdict for the defendant. Conjecture or irrational speculation by the jury as to conclusions of fact should not be allowed; and unless there be such proof as would justify a deduction of a *rational conclusion* as to the existence of the essential facts to entitle the plaintiff to recover, the instruction should be for the defendant. Otherwise there would be no certainty attained, and often the grossest injustice would be inflicted in the trial by jury. In deciding the question whether there be any evidence *legally* sufficient to be submitted to the jury, or whether there be evidence from which a rational conclusion of the fact or facts sought to be established may be deduced, the court is not called upon to decide simply a question of facts; but the question of the *legal* sufficiency of the evidence is one of law, and of which the court is the exclusive judge; and the decision of which question, when raised, is preliminary to the right of the jury to pass upon the sufficiency of the evidence in point of fact. This is a well-settled principle in the trial by jury, and has been too often applied by this court to be an open question at this day. *Cole v. Hebb*, 7 G. & J. 20, 29, 36, 40.

The argument at bar, on the part of the plaintiff, was mainly directed to show that there was evidence of the essential facts, legally sufficient to be submitted to the jury, and that the court below was in error in directing a verdict for the defendants. But, upon careful examination of the record, we fail to discover any *legally* sufficient proof upon which a verdict for the plaintiff could have been based. There is no sufficient evidence, indeed, no evidence at all, of the want of ordinary care

and diligence on the part of the defendants in the employment of the foreman or superintendent of the work, or of the other co-labblers with the deceased; nor is there any evidence whatever of the want of ordinary care and diligence on their part in providing the materials with which to do the work. On the contrary, all the proof, that on the part of the plaintiff as well as that on the part of the defendants, tends clearly to show that the foreman or superintendent having the direction of the work was a competent and skilful workman, and that there were two others, among those employed on the work, who were skilled as bridge builders. And having employed a competent and skilful foreman to supervise and direct the work, there was certainly no obligation on the defendants to select other hands more skilled and careful than the deceased himself for his protection. There is no question as to the sufficiency of the materials furnished for doing the work, or for the making sufficient scaffolding. But the question raised, and made most prominent by the prayers offered by the plaintiff, is, whether there was sufficient structure or scaffolding erected to protect the workmen against accident while engaged in the work on the bridge. And another question made is, whether the particular mode adopted for doing the act or piece of work, in the doing of which the accident occurred, was safe and proper in itself; and such as men of ordinary prudence and skill would adopt? Both of these propositions may be considered together.

There is no pretense that either of the defendants was present when the accident occurred, or that either of them gave any special direction as to the manner of doing the particular piece of work in the course of which the accident happened. As has already been stated, there is no doubt or question of the fact that the immediate and direct cause of the accident was the use of the short plank on the greased rails. The work of moving the segments and putting them in place was in its nature perilous, and required great caution on the part of those engaged in it. The peril, however, was open and obvious to the senses of every one engaged in the work; and, while it is clear that there was great want of caution in the use of the plank on the greased rails when engaged in turning the segment, it by no means follows that the defendants are liable for the consequences of that want of care. Ample materials had

been provided, and were at hand, with which a proper scaffolding or safeguard could have been constructed; and it was the duty of those engaged in doing the work to have so used the material for their protection. This precaution was neglected, but it was not the fault of the defendants; it was the neglect of the fellow-servants or co-laborers of the deceased, the risk of whose negligence the deceased assumed, as between himself and the defendants, when he entered the employment. No better illustrations of this could be required than the two closely analogous cases of *Wigmore v. Jay*, 5 Exch. 352, and *Gallagher v. Piper*, 16 C. B., N. S., 669, before referred to, in both of which cases it was held that because there was no sufficient evidence of personal negligence on the part of the defendants, therefore they were not liable for the accidents that occurred.

But, according to all the testimony and the undisputed facts of the case, the deceased directly contributed to his misfortune by his own want of caution for his safety. The danger was open before him, and he was required to use his senses and to exercise his judgment for his protection. He could not fail to see that there was but a single plank upon which the men could stand, and that the plank rested upon the greased iron rails. He saw, and knew of course, that there was no scaffolding under him, and that if the plank should slip there was danger of falling to the ground below. He had, moreover, full knowledge of the *modus operandi* of the moving and putting the segments into place, as he had aided in moving and placing the segments previously adjusted in the arch, when but a single plank was used for the men to stand on while turning the segments to be raised by the derrick.

Now, with this knowledge, and this plainly apparent risk open to the senses of the deceased, upon what principle can the defendants be made liable for the accident that happened to the deceased in consequence of the risk thus knowingly assumed by him? The principle is perfectly well settled, that an employee who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes *open and obvious*, the dangerous character of which causes he had an opportunity to ascertain. And so if a man chooses to accept an employment, or *continue in it*, with the knowledge of the danger, he must abide the consequences, so far as any claim against the employer is concerned. These

propositions are well settled upon authority, and have been expressly approved by this court, in the case of *R. R. Co. v. Stricker*, 51 Md. 47, 15 Am. Neg. Cas. 361, *ante*. See Wharton on Negl., § 214; *Woodley v. R'y Co.*, L. R., 2 Exch. Div. 389, cited with approval in *Stricker's* case (1). The party knowing the danger and having assumed the risk, the defendants cannot be made liable for not having adopted precautionary measures for his protection.

In the case of *Sullivan v. India M'fg Co.*, 113 Mass. 396 (2), where a party was injured by being caught in the gearing of a machine near which he was employed, and where the danger was open and apparent, upon a motion for a new trial, after a verdict for the defendant, the court, in support of the verdict, stated the law applicable to the case thus: "When the employee assents to occupy the place prepared for him, and to incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might, with reasonable care, and by reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no ground of complaint, even if reasonable

1. In *WOODLEY v. METROPOLITAN DISTRICT R'Y Co.*, L. R. 2 Exch. Div. 384, it appeared that a railway company employed a contractor to do work upon a side of a dark tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its approach. Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching

the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a lookout man or altering the usual mode of conduct in the traffic. Held, that the plaintiff, having continued the work, with full knowledge of its dangerous nature, had no remedy against the company.

2. Reported with the Massachusetts cases in this volume of AM. NEG. CAS., page 527, *post*.

precautions have been neglected." And in the case of *Sullivan's Adm'r v. Louisville Bridge Co.*, 9 Bush (Ky.), 81, 15 Am. Neg. Cas. 147, *ante*, after a very full examination of the authorities, the same principle was applied in a very much stronger case for the plaintiff than the present. There the plaintiff's intestate fell from a narrow plank erected over the Ohio river where he and others were engaged in passing stones for the filling a crib used in the construction of a bridge over that river. It appeared that he and others had hesitated before the accident about going on the plank, but being told to do so or go home, he did go on the plank as he was directed, and he fell into the river and was drowned. The court refused to set aside the verdict for the defendant, upon the ground that the deceased had knowingly taken upon himself the risk of doing the work.

Upon the whole record, we discover nothing that would justify this court in reversing the rulings of the court below. There being a legal insufficiency of evidence to be submitted to the jury, the court properly directed the verdict to be rendered for the defendants. The judgment must, therefore, be affirmed.

As, however, there has been a large amount of matter incorporated in the record unnecessarily, in disregard of the fifth rule regulating appeals, and this by agreement, resulting from a disagreement as to the proper preparation of the bill of exception, we think it right that each party should bear one-half of the cost of printing the transcript of the record in this court; and we so order.

Judgment affirmed.

ROBINSON and MAGRUDER, JJ., *dissented*.

EMPLOYEE INJURED BY FALLING OBJECT—FELLOW-SERVANT—INCOMPETENCY—HABITUAL NEGLIGENCE—EVIDENCE—INSTRUCTION.—In **BALTIMORE ELEVATOR COMPANY OF BALTIMORE CITY v. NEAL**, 65 Md. 438 (*April Term*, 1886), employee injured by falling object while engaged in shoveling grain into the hoppers of an elevator, judgment for plaintiff in the Superior Court of Baltimore city was *reversed* for erroneous admission of certain evidence, instructions, etc. JOHN H. THOMAS appeared for appellant (defendant below); W. HALL HARRIS and J. MORRISON HARRIS for appellee. The opinion was rendered by ALVEY, CH. J., and the case and rulings are set forth in the syllabus to the official report as follows:

"The plaintiff, while engaged as a laborer in shoveling grain from cars into the hoppers of an elevator, owned and operated by the defendant, was ordered by the foreman, whose order he was required to obey, to assist in hauling in and fastening to the pier of the elevator, a square rigged vessel to be loaded from the elevator. The vessel had been brought to the pier by, and was in charge of, a steam tug commanded by an employee of the defendant. The captain of the tug neglected to have the yards of the vessel properly braced or stayed, so as to avoid contact with the elevator building, while in the act of being placed alongside the pier; and in consequence of this neglect of duty the yards of the vessel came in contact with the building and knocked off a parcel of slating, which fell upon and injured the plaintiff. In an action by the plaintiff against the defendant to recover damages for the injury, it was *held*:

"1st. That the captain of the steam tug and the plaintiff were fellow-servants, engaged in the same common service, of operating and carrying forward the business of the elevator, though employed in different departments of that service.

"2d. That the *onus* of proof was upon the plaintiff to show affirmatively, first, that the injury suffered by him was caused by the negligent or unskilful management by the captain of the tug, in attempting to place the vessel in tow in position alongside the pier; and if so, secondly, that there was want of ordinary care and diligence on the part of the defendant in the employment, or in the retention in service of the captain of the tug; and upon his failure to establish both these propositions, he could have no ground of action against the defendants.

"One of the witnesses testified that he was at the time of the accident, and had been for eight years, foreman of the defendant in conducting the work of the elevator, and during that time had frequent and constant opportunities of observing the way in which the tug brought vessels into the wharf at the elevator. He also testified that he had been engineer and assistant engineer in different steamers plying to different parts of the country, and that he was familiar with the operation of tugs about the harbor of Baltimore, having been about the harbor for twenty-three years. *Held*:

"1st. That he was competent, as an expert, to give an opinion upon the state of the case as he observed it, as to whether the vessel was skilfully or negligently brought to the pier by the captain of the tug (1).

1. On this point the court said: "In the case of *Malton v. Nesbitt*, 1 C. & P. 70, before Abbott, L. C. J., it was held that you might call experienced nautical men, and ask them, whether in their judgment, particular facts, which had been proved, amounted to gross negligence in the captain of a vessel or not. And so in the case of *Fenwick v. Bell*, 1 C. & K., 312, in an

" 2d. That it was not competent to show by the opinion of the witness, that upon former occasions, when bringing in vessels to the pier or wharf by the same captain of the tug, accidents had occurred, that those accidents were the result of negligence on the part of the captain, when those occurrences were not proffered to show knowledge on the part of the defendant or its superintendent, of the incompetency or negligence of the captain (1).

" 3d. That proof of former acts of carelessness or unskilfulness on the part of the captain of the tug, furnished no legitimate ground of presumption that he was guilty of negligence on the occasion when the plaintiff was injured.

" 4th. That the knowledge or opinion of the witness, in regard to the want of competency or the negligent conduct of the captain of the tug on those occasions, could not be imputed to the defendant or its chief managing officers, to show negligence in retaining an unfit employee; it not being shown nor pretended that the witness had any control over the captain of the tug, he had not employed him, and had no power to discharge him.

" The declaration of the defendant's assistant superintendent, while engaged in the general management of the defendant's affairs, and while observing the captain of the tug in the act of bringing in a vessel to the wharf, that 'the longer he was in the employ, the worse he got,' or words to that effect, was admissible as bearing upon the question of knowledge by the defendant or its chief managing agent of the unfitness of the captain for his position; and as showing that the defendant had not used reasonable care to avoid retaining in its service an unfit servant after becoming possessed of such knowledge.

" Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent.

" The simple fact of the happening of the accident did not authorize the jury to infer that there was negligence or unskilfulness on the part of the captain of the tug.

" It is a principle of universal application in actions at law, that it is not upon the evidence alone, but upon the pleadings, and the

action for running down the plaintiff's ship, it was held, that a nautical witness might be asked, whether, having heard the evidence, and admitting the facts to be true, he was of opinion that the collision could have been avoided by proper care on the part of the defendant's servants. 1 Greenl.

Ev., § 440. The principle of those cases would seem to be quite applicable here."

1. The court cited *Malton v. Nesbitt*, 1 C. & P. 70, and *Pitts. Ft. W. & C. R'y Co. v. Ruby*, 38 Ind. 294, 14 AM. NEG. CAS. 503.

evidence applicable to the pleadings, that a plaintiff can recover in any case.

"An instruction to the jury, that if the defendant's agent had knowledge of any circumstances showing want of sufficient competence and skill of the captain of the tug, the defendant would be responsible, was erroneous as being too indefinite, and, therefore, misleading.

"The jury should have been instructed as to what state of case would render it negligent on the part of the defendant to retain in its service the captain of the tug, leaving the jury to apply the evidence to such definition, and find accordingly.

"The court has no power to examine and decide upon the comparative weight of evidence; that is exclusively for the jury.

"It is the duty of the court to decide, as a preliminary legal question, whether there be any evidence legally sufficient to be considered by the jury, and the criterion for the determination of that question is, whether the evidence is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the proposition sought to be maintained by it."

WOOD (RECEIVER OF THE MARYLAND STEEL CO.) V. HEIGES.

Court of Appeals, Maryland, March, 1896.

[Reported in 83 Md. 257.]

LIABILITY OF MASTER TO SERVANT FOR INJURY CAUSED BY DANGEROUS MACHINERY—EVIDENCE—OPINION OF WITNESS AS TO CHARACTER OF MACHINERY—ASSUMPTION OF RISK.—A master is not liable for an injury suffered by his servant in the course of his employment unless he has been guilty of some neglect of duty. He is bound to exercise reasonable care in supplying proper machinery, but is not bound to provide machinery of any particular description, nor machinery like that used in certain other establishments. Plaintiff, an employee in defendant's foundry, was ordered to do certain work at a point some thirty or forty feet distant from the place where defective iron castings were being broken by dropping upon them a heavy iron ball from the roof. Before the ball was dropped, the foreman in charge of the work cried out a warning so that persons near might retreat and avoid the flying fragments of broken iron. These, however, were never known to fly as far as twenty-five feet. Defendant's appliance for breaking iron was in good condition, was operated by competent workmen and was constructed on the plan used in many other foundries. Plaintiff had seen this work done for months before the day on which he was injured by a fragment which flew to an unprecedented distance

and struck him. He had been warned that the ball was about to drop and had had time to retreat to a greater distance if he deemed it safer.

Held:

- "1st. That there was no evidence of negligence on the part of the defendant.
"2nd. That the plaintiff having accepted and continued in the employment with full knowledge of all the risks necessarily incident to the service, he must be considered as having assumed such risks."

Where the person operating the machinery by which the plaintiff was injured is a witness, and it is charged that the accident was owing to negligence in working the machinery, his skill as a workman is involved, and he may be asked what previous experience he had had in doing similar work. A witness acquainted with machines like that by which plaintiff's injury was caused may testify as to whether the one in question was, in his opinion, safe or not.

Since the issue is whether the particular machinery by which plaintiff was injured was proper and suitable, it is not competent to ask a witness whether, if some particular precaution had been adopted the injury would not have been inflicted.

(Syllabus to official report.)

APPEAL from the Court of Common Pleas. At the trial the first nine exceptions were all taken by the defendant to the action of the trial court (Harlan, Ch. J.) in allowing certain questions to be asked the witness, McAfee, who operated the "drop" machine by which the plaintiff was injured. In the first exception, after describing the machine and the manner in which the plaintiff was struck on the elbow by a flying fragment of iron, the witness was asked if he had been previously employed in breaking scrap iron. He replied that he had done so on an electric crane. He was then asked to explain what an electric crane was. The court overruled defendant's objection to this question and allowed the same to be answered.

The second exception was taken to the court's permitting the same witness to be asked whether in his opinion the machine operated by him was a proper machine for breaking iron. To this the witness answered that it "was constructed in a proper way, that is, it was constructed like other drops."

The third exception was to the overruling of the defendant's objection to this question: "Was there the same protection about it as there was to these other drops?" The witness replied: "I never was in a foundry before; this is the only method I know of breaking iron in a foundry. The scrap I seen broken was broken outside; that is to say, in open fields. They had a battery put up where the men that pulled the rope and work the drop generally went into before they pulled the

rope, that was for their protection. But there were no other men around. That is the way the other drops I have seen worked, but they wasn't in any foundry. They were for the different steel works, and the scrap they broke came from different parts of the steel works; not from the foundry, but from different parts."

In the fourth exception the witness was asked: "Would the construction of such a battery about this structure have made it a safe machine?" To which the defendant's counsel objected, but the court overruled the objection and permitted the question to be asked, and the witness replied: "It would have been almost impossible to put a battery around this machine. This battery I tell you about was put only for the men that were operating the drop, and that drop was out in the open field, you might say, and there was no one else working around it except the men that were operating the drop itself, and the battery was put up for their protection alone; there were no other men to be protected. I had nothing to do with operating those drops; I had nothing to do with them."

The fifth exception was taken to the permitting the same witness to say whether, as an expert, he considered the machine he was operating to be dangerous. The sixth and seventh exceptions were taken to the rulings by which the witness was allowed to say whether he considered the machine as dangerous for the men that worked about there.

In the eighth exception, the witness was asked if he considered the machine dangerous for a man within twenty-five feet, to which he replied: "That would depend upon what kind of scrap I was breaking, that is, if I was working on heavy scrap; for myself, I would not be afraid of standing there, or afraid it would hit me; and if I was breaking light scrap, I wouldn't want the men to be standing too close." To the action of the court in overruling the objection to the question and answer the defendant excepted.

In the ninth exception, the witness was asked: "Could there have been any construction put about the bed of this machine, about the ground where this breaking took place, any fenders or anything of that sort which would have protected the men from these flying pieces of iron?" To which the defendant's counsel objected, but the court overruled the objection and permitted the question to be asked, and the witness replied: "It would have been difficult to do so on account of its being

in the road of other work going on in the foundry; anything like that would be in the way of transportation going backwards and forwards, and it would be in the way of the moulders working there."

Those prayers of the plaintiff which were granted (except the one relating to the measure of damages) were as follows:

2nd. If the jury shall find from the evidence that the plaintiff was injured, as detailed in the evidence, while employed by the defendant in and about the foundry operated by the defendant; and that said injury was caused by the unsafe and dangerous condition of the machinery and appliances there used without any fault or negligence on the part of the plaintiff thereto contributing, and that said unsafe and dangerous condition of said machinery and appliances was or might have been known to the defendant by the use of due diligence, and could not have been known to the plaintiff by due diligence, then their verdict must be for the plaintiff. (Granted.)

3rd. That if the jury shall find from the evidence that the plaintiff was employed by the defendant as a common laborer in and about the foundry managed and controlled by the defendant at Sparrow's Point, and that the plaintiff, while so employed, was injured by a piece of iron being hurled upon him from an unsafe and dangerous machine operated in said foundry; that the unsafe and dangerous character of said machine was, or might have been known to the defendant by the use of due diligence, and that the plaintiff had nothing to do with the construction or operation of said machine, and did not know, and by the exercise of ordinary care could not have known, of its unsafe or dangerous character, then their verdict must be for the plaintiff, unless they find that the plaintiff contributed to his injury by the want of ordinary care and prudence. (Granted.)

The defendant offered the following prayers, all of which except the eighth were rejected:

Defendant's 3rd Prayer.—The defendant prays the court to instruct the jury that there is no evidence in the case of any such negligence on the part of the defendant in discharge of its legal obligations to the plaintiff as would entitle him to recover in this action. (Refused.)

Defendant's 4th Prayer.—That if the jury find from the evidence in this case that the plaintiff, at the time and place when and where he suffered the injury complained of, was in the

employ of the defendant, and that said injury was caused and owing to the negligence of another servant or servants of the defendant, the plaintiff can not recover unless he shall satisfy the jury that in selecting the servant or servants, through whose negligence the accident occurred, the defendant did not use due care and ordinary prudence in procuring faithful and competent servants; and further, that in this case the plaintiff has offered no evidence from which the jury may find that the defendant did not use such care in the selection of said servants, and therefore their verdict must be for the defendant. (Refused.)

Defendant's 5th Prayer.—The jury are instructed that the undisputed evidence in this cause shows that there was no want of ordinary care on the part of the defendant in the discharge of his legal obligations to the plaintiff, and the verdict must be for the defendant. (Refused.)

Defendant's 6th Prayer.—The jury are instructed that under the testimony in this case the machinery and appliances in use by the defendant were such as were in ordinary use, and it can not be held responsible, because it failed to use some other or different kind, and their verdict must be for the defendant. (Refused.)

Defendant's 7th Prayer.—The jury are instructed that the defendant was not bound to use the newest, safest or best machinery or appliances, and it is not liable for negligence for not having any device around the machinery which caused the accident, and their verdict must be for the defendant. (Refused.)

Defendant's 8th Prayer.—That if the jury find from the evidence that the plaintiff, by reasonable care and caution, could have avoided the piece of iron which caused the accident, that then he cannot recover. (Granted.)

Defendant's 9th Prayer.—The jury are instructed that if they believe the accident was caused by the negligence of the fellow-servants of the plaintiff, then he is not entitled to recover, and they are further instructed that Grafton and McAfee were both fellow-servants of the plaintiff. (Granted.)

The defendant specially excepted to the granting of the plaintiff's second prayer, because there is no evidence of the defective and dangerous condition of the machinery and appliances used in the place where the accident happened. And to the granting of the third prayer, because there is no evidence of the dangerous and unsafe character of the machinery used by the defendant.

The jury returned a verdict for the plaintiff for \$2,500, and from the judgment thereon the defendant appealed. *Judgment reversed.*

The cause was argued before McSHERRY, CH. J., BRYAN, FOWLER, BRISCOE, PAGE and BOYD, JJ.

ALEXANDER PRESTON (with whom were J. ALEX. PRESTON and ROBERT LUDLOW PRESTON on the brief), for appellant.

CHARLES E. HILL, for appellee.

Page, J.— This action was brought by the appellee to recover damages for injuries sustained in the works of the Maryland Steel Company, while engaged in the service of the receiver of that concern. He entered upon his employment about the 13th day of January, 1894, as a moulder and general laborer. On the twenty-ninth of March following, he was ordered by his foreman to clean certain castings on a car-truck, used for transferring material from place to place in the foundry. It was then located from twenty-five to thirty feet distant from an appliance then being used by other workmen in breaking up defective castings. This appliance consisted of an arrangement by which a heavy iron ball, weighing seventeen or eighteen hundred pounds, could be hoisted to the roof of the building and dropped upon the castings beneath. From a drum (revolved by a crab-engine), a rope passed through a pulley fixed in the comb of the roof. The ball was attached to the end of this rope, and when at the proper height it was dropped by means of a smaller rope, connecting with a device for tripping the fastening that sustained it. The castings to be broken were sometimes very large, measuring eight feet in height and weighing seven or eight tons. On the day of the accident, the castings rested on pieces of "core-bars," placed on the floor, for sake of greater solidity. When it was proposed to strike the casting at a particular point the ball would be swung a little, and while still swinging, it would be dropped, so as to fall upon the desired spot. The effect of the impact of the heavy ball upon the casting was to break it; and (to use the language of the witness, McAfee) to cause the pieces to "jump up * * * in a circle around the drop of about ten feet, and of course that was sacred ground." None of the witnesses, however, had ever seen the fragments fly so far as the place where the appellee was standing when injured. This particular drop had been in operation about two weeks. Before its erection the method of breaking castings was the

same, except that instead of a fixed hook in the comb of the roof, a traveling crane was used to hoist the ball. Workmen engaged near the drop were always notified when the ball was about to be dropped by the stoppage of the engine, and by the warning voice of McAfee, who always, before he pulled the rope, cried in a loud voice, "heads up" or "lookout." These warnings were given to the appellee, and if he heard them he had time to move to a safer distance had he desired to do so. The appellee's account of the accident is that while he was at work on the casting, twenty-five, thirty or forty feet from the drop, "he heard a voice, and raised up from a stooping position, and saw a small piece of iron fly up from where they were breaking iron; * * * after a time he heard a voice again and raised up again, and as he raised a man pulled the drop, and a piece of iron flew towards him;" he tried to get away but could not; a cylinder-head was on his right, a car-truck in front, and behind him, six or eight feet, a hydraulic plunger. He never thought of danger. He had worked in the foundry "most of the time" from January until then; he had never seen a piece of iron fly so far before. He had seen the drop worked before, and when it was first put in, he, in common with everyone else, had looked to see what impression it would make on the ingot mould about to be broken. Much testimony from other witnesses was offered to explain the machinery of the drop, the effect upon the castings, and also the details of the accident. There was also proof to the effect that iron was broken upon the same principle in foundries at Chambersburg and Westminster and other places; and there was a description of a breaking machine with a battery about it for the protection of workmen, used in a steel works in Pennsylvania.

Upon this evidence the court submitted it to the jury to determine whether the injury was caused, without fault of the plaintiff, by the unsafe and dangerous condition of the machinery and appliances, which was, or by the use of due diligence could have been, known to the defendants; and if they so found, instructed them to bring in their verdict for the plaintiff. The defendant excepted specially to this instruction, because there was no evidence of the unsafe, dangerous or defective character or condition of the machinery.

It was not contended either in this court or below that the drop machine was not in perfect condition, or that it was not operated by a thoroughly skilful workman. But it was insisted

that the machine was dangerous and unsafe, and that the appellant should have provided additional protection to those whose duty it became to work in its vicinity.

The liabilities of the master to his employee have been considered by this court in too many cases to require here more than a statement of the general principles applicable to the subject. When a servant engages to perform certain services for a compensation, it is implied as a part of the contract, that, as between himself and his employer, he assumes all the risks incident to the service. And these risks include such as arise, from the hazardous character of the service, and from the negligence of other servants in the same employment, even though they may be in a different grade. But the master himself is bound to use ordinary (that is, due and reasonable) care and diligence to provide proper materials and appliances to do the work, and in the selection and employment of competent and careful fellow-servants. In addition to this, the master can not negligently expose the servant to such extraordinary perils in the course of the employment that the servant, from the want of knowledge, skill or physical ability, can not, by ordinary care and prudence, under all the circumstances of the case, guard himself against them. *State (use Hamelin) v. Malster & Reaney*, 57 Md. 307, 15 Am. Neg. Cas. 375, *ante*. Yet, while the master is thus bound to protect his employees, there is no contract obligation imposed upon him to provide machinery of any particular description; his obligation extends no further than to require him to use that care which ordinary prudence and the exigencies of the situation demand in providing the servant with machinery or other instrumentalities safe for use by him. *Hough v. Texas & P. R. R. Co.*, 10 Otto, 213.

If a servant has knowledge of the circumstances under which the employer carries on his business and chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so. *State (use Hamelin) v. Malster & Reaney*, *supra*; *Wonder's case*, 32 Md. 416, 15 Am. Neg. Cas. 352, *ante*; *Stricker's case*, 51 Md. 47, 15 Am. Neg. Cas. 361, *ante*; *Balt.*

& *P. R. R. v. State* (use *Abbott*), 75 Md. 161, 15 Am. Neg. Cas. 373, *ante*. Where, however, the risks to which the servant is subjected are such, as he had no reason to believe, from the nature of his employment, he would have to encounter, and such risks arise from causes hidden or secret, or such as would reasonably escape his observation, the master is bound to notify his servant, provided he himself knew, or by the exercise of ordinary care ought to have known, of them. *Saxton v. Hawksworth*, 26 L. T. N. S. 351 (1); *U. P. R. R. Co. v. Fort*, 84 U. S. 213; *Sjogren v. Hall*, 53 Mich. 274 (2); *Clark v. R. R. Co.*, 28 Minn. 128 (3); *Shipbuilding Works v. Nuttal*, 119 Pa. St. 149.

The master is, therefore, not an insurer of the servant's safety. He can not be bound for his servant's injury, without being chargeable with some neglect of duty, measured by the standard of ordinary care. On the other hand, the servant is under an obligation to provide for his own safety when danger is either known to him or discoverable by the exercise of ordinary care. "He must take ordinary care to learn the dangers which are likely to beset him" (*Beach on Contrib. Neg.*, § 138), and where the servant is as well acquainted as the master with the dangerous nature of the instrument used he can not recover. *Beach on Contrib. Neg.*, § 140; *Wheeler v. Wason M'fg Co.*, 135 Mass. 298 (4).

In the case at bar the appliance used for the breaking of castings was in perfect condition and operated by a competent and skilful person. It was constructed on the plan adopted and used in other foundries. In all their experience in operating it, none of the witnesses had ever seen pieces fly so far before. Heiges had seen the breaking of castings with the crane, for more than two months. He had witnessed the construction of the "drop," had watched the ball hoisted to the roof, and had observed what impression was made on the ingot to be broken. For two weeks he had been a daily wit-

1. In *Saxton v. Hawksworth*, 26 L. T. N. S. 351, it appeared that plaintiff was a sheet roller in defendant's steel works and was injured by a runaway steam engine used in the works. Held. that the plaintiff assumed the risks incidental to the service, and was not entitled to recover for the injuries sustained by him.

2. Reported with the Michigan cases at end of this volume.

3. Reported with the Minnesota cases at end of this volume.

4. Reported with the Massachusetts cases in this volume, p. 619, *post*.

ness of the process, and presumably being a person of average intelligence, must have known, as well as any one, the risks and dangers attending its use. He did not know that pieces of iron would fly twenty-five feet, nor did any one. He received two warnings that the ball was about to drop—once, when the engine stopped, and again when McAfee cried out “heads up.” Either warning was in time to enable him to retreat to a greater distance, and though the cylinder-head was on his right, the car truck in front and hydraulic plunger six or eight feet behind him, the proof establishes the fact there was a clear way still open to him. Now, despite his knowledge of the machine, its effect upon the castings, and his double warning, either through inattention or carelessness, or a feeling of security, he merely raised himself up. Then the unexpected happened; he saw the iron flying towards him; it was too late to avert the danger, and he was injured. With our view of the law, as stated, we can perceive here no evidence of neglect on the part of the receiver. He employed “due and reasonable diligence, having respect to the nature of service, to provide proper materials, appliances and instrumentalities for doing the work,” and to select competent and skilful persons to manage them.

But, apart from this, we are of opinion there is another ground upon which the plaintiff is not entitled to recover. He accepted employment to work in the foundry, with a full knowledge of all the circumstances under which the business was conducted, and continued in it after the “drop” was put up. His duty was that of a moulder, chipper of castings and general laborer. Such duty required him to work in all parts of the foundry. On the particular occasion, when he was injured, he accepted the position assigned him to discharge an ordinary duty, within the scope of his employment, with a full knowledge of all its surroundings and dangers, without remonstrance; and having done so, “he must abide the consequences, so far as any claim against the employer is concerned.” *Malster's case, supra*; *B. & O. R. R. Co. v. Stricker*, 51 Md. 47, 15 Am. Neg. Cas. 361, *ante*.

From what we have said it follows that there was error in granting the second and third prayers of the plaintiff, and in rejecting the defendant's third, fifth, seventh and eighth prayers. By the granting of his ninth prayer the defendant received the substantial benefit of the principle embodied in his fourth.

There was no error in the first exception. The narrative by the second count charged that the accident was due to "gross negligence in the working of the machinery," etc. McAfee was the operator of the machine. His competency thus became involved in the issues of the case. He had just stated he had broken scrap on an electric crane. The question was, therefore, calculated to elicit testimony which would show what had been his experience; from which, in connection with other evidence, the jury could form some opinion as to his competency to operate the drop.

The question and answers contained in the second, fourth, fifth, sixth, seventh and eighth exceptions were properly allowed. Whether the machine was safe or not was a matter requiring special skill, knowledge and experience, and McAfee had already been shown to be one whose experience had made him familiar with the matter. *Balt. & Yorktown, etc., Co. v. Leonhardt*, 66 Md. 77, 78, 3 Am. Neg. Cas. 680.

The interrogatories excepted to in the third and ninth exceptions, we think, were improperly allowed. It has already been said that the master is not obliged to provide machinery similar to that used in other establishments, though that may be less dangerous. The issue was whether the particular machinery was proper and suitable; and that was to be determined by its actual condition, and not by comparing it with other machines. *Crowther's case*, 63 Md. 569.

Judgment reversed without a new trial.

LIABILITY OF OWNER OF BUILDING FOR INJURY TO EMPLOYEE OF TENANT CAUSED BY FALLING DOWN ELEVATOR SHAFT. — In **THE PEOPLES' BANK OF THE CITY OF BALTIMORE v. MORGLOFSKI**, 75 Md. 432 (*January Term, 1892*), employee of tenant injured by falling down elevator shaft in defendant's building, judgment for plaintiff in the Superior Court of Baltimore City was *affirmed*. The syllabus to the official report states the case and points decided as follows:

"The defendant owned a building which was occupied by a number of tenants for business purposes. There was an elevator in the building which was used both for passengers and freight, and was in charge of and operated by the defendant's agent. The plaintiff was employed by one of the tenants, and was seriously injured by falling down the elevator shaft, the door of the shaft being open at the time, and the bar pulled back; and the plaintiff having stepped into the shaft, supporting the elevator was there, it being too dark

for him to see that it was not. In a suit brought by him against the defendant for the injuries thus sustained, evidence was offered by both parties bearing upon the question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. *Held:*

"1st. That there was testimony before the jury tending to prove, if they believed it, that the defendant did not use that reasonable caution and vigilance which is required in the management of an elevator like the one described by the witnesses, which was used both for passengers and freight.

"2d. That the elevator was in charge of and operated by the defendant's agent, and it was bound at all times to use reasonable caution and care to make the elevator safe for all persons who had a right to use it, or did in fact use it, with the defendant's knowledge and consent.

"3d. That when elevators remain under the control of the owner of the building he is liable to his tenants for any defect in them, their appointments, or their management, which reasonable care and vigilance would have prevented.

"4th. That the exercise of the most ordinary care by the defendant in this case would have resulted in keeping the elevator door closed, and in preventing the injury to the plaintiff.

"5th. That ordinarily, the question of negligence is one for the jury, but sometimes it becomes the duty of the court to instruct them that, in spite of the negligence of the defendant the plaintiff cannot recover.

"6th. That the court, however, will never assume this responsibility unless the case is a very clear one, and presents some prominent and decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ.

"The act relied on to show contributory negligence on the part of the plaintiff was that he walked into the elevator shaft without looking to see if the elevator was there. He testified that he could not see at all, but that he was sure, with the door open and the bar back, the elevator was in its place, and that it was so dark he could not see whether it was there or not. There was evidence to show that the hall was dark in front of the elevator, and that the distance from the door of the elevator to the door from which the plaintiff came was only one or two steps. *Held:*

"1st. That the court properly left it to the jury to find whether, under all the circumstances of the case, the plaintiff had a right to assume that the elevator was at the fourth floor where he stepped into the shaft.

"2d. That it was a question of considerable doubt, whether the conduct of the plaintiff constituted such contributory negligence as

should prevent him from recovering; and, where such doubt exists, the question of contributory negligence is one of fact, to be determined by the jury.

"3d. That it was the duty of the defendant to operate the elevator in question with reasonable care and vigilance; and the plaintiff had a right to assume that this duty would be faithfully performed.

"4th. That so assuming he would not be required to exercise that degree of caution which could properly and fairly be demanded of him under other circumstances.

"5th. That the jury were properly instructed that if they found for the plaintiff, in estimating the damages they were at liberty to consider the health and condition of the plaintiff before the injuries complained of as compared with his then condition in consequence of such injuries, and whether the said injuries were in their nature permanent, and how far they were calculated to disable the plaintiff from engaging in those pursuits and employments, for which, in the absence of said injuries, he would have been qualified, and also the physical and mental suffering to which he was subjected by reason of said injuries, and to allow such damages as in the opinion of the jury would be a fair and just compensation for the injuries which they might find the plaintiff had sustained.

"Where a special exception to a prayer for want of evidence is not contained in the bills of exception, signed and sealed by the trial judge, it cannot be considered in the Court of Appeals."

[The counsel in this case were ROBERT LUDLOW PRESTON and J. ALEXANDER PRESTON for appellant (defendant below); BERNARD WEISENFELD and JOHN PRENTISS POE, Attorney-General (ISIDOR RAYNER on the brief), for appellee.]

ELEVATOR CASES.—In **LORENTZ et al. v. ROBINSON**, 61 Md. 64 (1883), where plaintiff, while using an elevator in defendant's factory, was injured by the fall of the elevator, judgment for plaintiff was *affirmed*. The exceptions related mainly to questions of practice.

In **WISE BROTHERS v. ACKERMAN** (by Next Friend), 76 Md. 375 (1892), where a minor employee, about fifteen years of age, while using an elevator in defendant's factory, was injured by his left foot and ankle being caught between the floor of the elevator and some projecting scantling or boards in the elevator shaft, judgment for plaintiff was *reversed*, for erroneous admission of evidence relating to other similar occurrences as that of the accident in question, for refusal to permit the cross-examination, by defendant, of a medical witness, on the question of credibility, and refusal to admit evidence in contradiction of such medical testimony.

DEFECTIVE MACHINERY — ASSUMPTION OF RISK — FELLOW-SERVANT. — In **YATES v. THE McCULLOUGH IRON COMPANY**, 69 Md. 370 (*October Term, 1888*), plaintiff, an employee in defendant's service, injured by being struck on the head by certain machinery attached to a bucket, the wheel of which left the track in defendant's building, judgment for defendant in the Circuit Court for Cecil County was *affirmed*. ALBERT CONSTABLE appeared for appellant (plaintiff below); L. M. HAINES and W. J. JONES for appellee. The opinion was rendered by MILLER, J., and the case and its rulings are stated in the syllabus to the official report as follows:

"As a general rule, the servant assumes all such risks arising from his employment, as he knew, or in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto, and he cannot recover against the master for injuries arising from such patent risks. If, therefore, the machinery or appliances which the master furnishes contains obvious defects, of which the servant knew, or as a reasonably prudent man might have known, or if he continues in the service after he has discovered, or by the exercise of reasonable care might have discovered, the existence of such defects, he cannot recover against the master for injuries resulting therefrom.

"In cases where knowledge of the defects does not necessarily carry with it the knowledge of the resulting danger, in order to establish that the servant assumed the risks involved in using the machinery, it must appear that the danger was known to him, as well as the defects that caused the danger, or that by reasonable care on his part they would have been known to him.

"The plaintiff, while employed in the service of the defendant, a corporation engaged in making charcoal by a patent process, was injured through defects in the machinery used in the charcoal works. The work the plaintiff was engaged in was the simplest kind of manual labor, and the machine he used was exceedingly simple in its construction and operation. The story of the building in which it was located and operated was open from the floor to the rafters. The wheel and track on which it ran were open to view, with no part covered or concealed, and there was nothing latent about the whole apparatus. The plaintiff was perfectly familiar with the machine and its working. He had worked with it for months in the fall and winter of 1885, and during that time, the wheel, while he was working it, fell from the track, at least once, in the same place it fell on the occasion of his injury. When he returned to the employment of the defendant in the spring of 1886, he asked to be put at the same work, and had been so engaged for about two weeks before the acci-

dent occurred, with the wheel and track in the same condition they were in when he left them in the preceding winter. *Held:*

"1st. That the knowledge possessed by the plaintiff of the defects in the machinery, necessarily, and in legal contemplation, carried with it knowledge of the risk, and that he voluntarily incurred the same by continuing in the employment of the defendant.

"2d. That an employee hired by the month, and paid a monthly salary; chief manager of the works, save that the officers of the company were over him; had no direct charge over the machinery, but had the right to repair it, and sometimes did repair it, but had no authority to buy, alter or change it; hired and discharged men, kept their time, made out the pay-roll, and sent it to the company's office, where the money due each one was put in an envelope, and when he received it he gave it to the men — was not a vice-principal or representative of the company, but a fellow-servant of the plaintiff, and the company was not liable for his negligence in the management of the machinery.

"Whether, upon a given state of facts, a party is a fellow-servant, or a deputy master, or vice-principal, is a question of law to be decided by the court."

MINOR EMPLOYEE INJURED BY CIRCULAR SAW — BURDEN OF PROOF. — In **MICHAEL v. STANLEY** (by Next Friend), 75 Md. 464 (*January Term, 1892*), minor employee injured by circular saw, judgment for plaintiff in the Court of Common Pleas was *reversed without new trial*. The opinion was delivered by ALVEY, CH. J., and the case is stated in the syllabus to the official report as follows:

"In an action by an employee against his employer to recover for an injury alleged to have been suffered by reason of defective machinery at which the plaintiff was required to work, in the saw-mill of the defendant, it appeared that the plaintiff was eighteen years of age, wanting two months; that he was employed to hand up wood to be sawed by a circular saw; that on the day of the accident he was directed by the superintendent in the mill to go to a particular saw, while the regular sawyer was otherwise employed, and operate it, and while doing this, in holding a stick of wood to the saw his left hand came in contact with the saw and three of his fingers were cut off. It further appeared that the saw had two teeth broken out of it, and that it was dull, and that the plaintiff had knowledge of these defects; that the operation of sawing a stick of wood was simple, and required no special skill in the operator; and that the plaintiff had acted as sawyer some ten or fifteen times before the injury; and that on one occasion, some weeks after he entered the employment,

he had his hand cut by one of the saws while sawing. *Held*: That the plaintiff was not entitled to recover.

"In an action by a servant to recover for an injury alleged to have been caused through the negligence of the master, the *onus* of proof is upon the plaintiff, and that *onus* requires him to show that the injury was caused solely by the fault or negligence of the master or those representing him; and the servant will not be entitled to recover, if it be made to appear that the injury would not have occurred but for the fault or negligence of the servant himself, directly contributing to the production of such injury."

INJURY TO CITY EMPLOYEE IN SEWER — CITY NOT LIABLE. — In **MAYOR, ETC., OF BALTIMORE v. WAB**, 77 Md. 593 (1893), judgment for plaintiff was *reversed*, and new trial not awarded, the case being stated in the syllabus to the official report as follows:

"In an action against the city of Baltimore, by a laborer in a sewer, to recover damages for personal injuries alleged to have been caused through the negligence of the defendant in employing an incompetent engineer who had charge of the engine which hoisted and lowered the cage or elevator in the shaft by which the plaintiff and other workmen were conveyed to and from their work in the sewer, it was shown that in lowering the cage the day before the injury happened, the engineer let it fall two or three times. *Held*: That although the cage fell by reason of the negligence of the engineer the day before the accident, this was no proof that he was incompetent, nor that the defendant had been negligent in selecting him for the position to which he had been assigned.

"It was shown in evidence that the city commissioner, an officer of the city who had charge of the construction of the sewer, selected the engineer who operated the hoisting machine, on the recommendation of two citizens, one a member of the city council, and a locomotive engineer of ten years' experience, after he had picked out another man for the place. *Held*: That negligence could not be ascribed to the officer in selecting the engineer, in the absence of evidence to show that a prudent man would not have regarded the recommendation.

"Evidence giving not the contents or even the substance of a letter, but merely the impression which its perusal left on the witness's mind, is inadmissible.

"In the absence of evidence showing that before the accident happened the city commissioner had any knowledge or information that the engineer had been careless the day prior to the injury of the plaintiff, there is no evidence of negligence on the part of the defendant in retaining him thereafter." Opinion by McSHERRY, J.

FARWELL v. BOSTON AND WORCESTER RAIL-ROAD CORPORATION.

Supreme Judicial Court, Massachusetts, March Term, 1842.

[Reported in 4 Met. 49.]

MASTER NOT LIABLE FOR INJURY TO SERVANT CAUSED BY NEGLIGENCE OF FELLOW-SERVANT.—Where a master uses due diligence in the selection of competent and trusty servants and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service.

ENGINEER INJURED BY NEGLIGENCE OF SWITCHMAN—RAILROAD COMPANY NOT LIABLE.—A railroad company employed A, who was careful and trusty in his general character, to tend the switches on their road; and after he had been long in their service, they employed B. to run the passenger train of cars on the road; B. knowing the employment and character of A. *Held*, that the company was not answerable to B. for an injury received by him while running the cars, in consequence of the carelessness of A. in the management of the switches.

In an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment and continued to perform his duties as engineer till October 30, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground, by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties:

“The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and

afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day; that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On October 30, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants) by one Whitcomb, another servant of the defendants, who had been long in their employment as a switchman or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as such servant was well known to the plaintiff. By which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff." *Plaintiff nonsuited.*

C. G. LORING, for plaintiff.

FLETCHER & MOREY, for defendants.

Shaw, Ch. J.—This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the

same purpose — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; *McManus v. Crickett*, 1 East, 106 (1). This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

1. In *McManus v. Crickett*, 1 of the master; but he is liable to East, 106, it was held that a master answer for any damage arising to is not liable in trespass for the wilful another from the negligence or unact of his servant, as by driving his skillfulness of his servant acting in his master's carriage against another, employ.
done without the direction or assent

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law — like that of a common carrier to stand to all losses of goods not caused by the act of God or of a public enemy — or that of an innkeeper to be responsible in like manner, for the baggage of his guests — it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley v. Fowler*, 3 M. & W. 1 (1); *Murray v. South Carolina R. R. Co.*, 1 McMullen (S. C.) 385.

1. In *Priestley v. Fowler*, 3 Mees. & W. 1 (Exch., 1837), a declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it

became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured: *Held* on motion in arrest of judgment after verdict for the plaintiff, first, that it was sufficiently to be collected from

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters can not excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Metc. 440-443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we can not always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable. In *Priestley v. Fowler*, *supra*, Lord Abinger, C. B., in delivering the opinion, said: "It is admitted that there is no precedent for the present action by a servant against a master;" and then proceeded to discuss the extent to which the principle of liability of a master to his servant would go, were it applied to the present case. "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailm., §§ 590 *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of

any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer. See *Winterbottom v. Wright*, 10 M. & W. 109; *Milligan v. Wedge*, 12 Ad. & E. 737 (1).

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it

1. In *Winterbottom v. Wright*, 10 M. & W. 109, it appeared that A. contracted with the postmaster-general to provide a mail-coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach. Held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction.

In *Milligan v. Wedge*, 12 Ad. & E. 737, it appeared that a butcher employed a drover to drive an animal home from the market. The drover employed a boy to drive the animal, who ran it into and damaged plaintiff's premises. Held, that the boy

was not to be deemed the servant of the owner of the animal, and that the owner was not liable for the damage inflicted by the animal.

In *KING v. BOSTON & WORCESTER R. R. CORP.* 9 Cush. (Mass.) 112, it was held that the rule which excuses a master from liability where an injury is caused by the negligence of a fellow-servant is not altered by the fact that the party injured is a child. A minor employee also assumes the risks of his employment where he is of sufficient age and experience to understand the dangers of the service.

See, also, *GILLSHANNON v. STONY BROOK R. R. CORP.*, 10 Cush. (Mass.) 228, on the question as to when the relation of master and servant commences.

first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the

servant has better means to provide for his own safety, but upon other grounds. Hence, the separation of the employment into different departments can not create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporations, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was

imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put upon the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the *gravamen* of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action can not be maintained.

Plaintiff nonsuited.

SNOW v. HOUSATONIC RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, September Term, 1864.

[Reported in 8 Allen, 441.]

DEFECTIVE ROAD-BED—LIABILITY OF RAILROAD.—A railroad company may be held liable for an injury to one of its servants, which is caused by a want of repair in the road-bed of the railroad.

EMPLOYEE INJURED WHILE ATTEMPTING TO UNCOUPLE CARS FROM MOVING TRAIN—DEFECTIVE TRACK—QUESTION FOR JURY.—If it is the duty of a servant of a railroad company to uncouple the cars of a train, and this cannot easily be done while the train is still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars and meets with an injury which is caused by a want of repair of the road-bed of the railroad, the court can not rule as matter of law that he was careless, but should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect.

TORT, to recover damages for an injury sustained by the plaintiff in consequence of a want of repair of the road-bed of the defendants' railroad.

At the trial in the Superior Court [Berkshire], before VOSE, J., it appeared that the injury was received at a place in West Stockbridge where the railroad of the defendants crossed a highway, and near an intersection with the Hudson & Boston railroad. The Western Railroad Company, as contended by the plaintiff, had a right under certain contracts to use the defendants' tracks and switches at this place, for the passing of their cars and engines, and for making up freight trains and distributing freight cars from the trains upon the different tracks uniting there. The plaintiff was employed by the Western Railroad Company to attend to the switches upon the defendants' railroad at this place, and to make up and distribute the freight trains for the Western railroad. A plan was put into the case, exhibiting the position and distances of the various points referred to. At the place where the defendant's railroad crossed the highway, three lengths of plank had been laid down between the rails and up to within about two inches of them, entirely across the highway; and one of these planks had become defective, and there was a hole in it large enough to admit a man's foot. This hole had existed for more than two months, and the plaintiff had known

of it for that length of time, and had complained of it to the repairer of the tracks of the defendant's railroad.

The plaintiff testified, amongst other things, that he was forty-seven years of age; that he had been employed upon railroads in various capacities for twenty-three years; that at the time of the injury he was engaged in distributing a freight train; that for the purpose of giving an impetus which should send the cars to the place where he wished them to be, he gave a signal to the engineer to back his engine; that the engineer did so, setting the cars in motion at a very slow rate; that while they were so in motion he stepped between the engine and the car next to it, at a short distance from the place where the hole in the plank was, for the purpose of uncoupling the cars, by taking out the pin by which it was connected with the engine; that while in that position, endeavoring to get out the pin, the train continued in motion, and he had to take two or three steps with it; that as he pulled out the pin, and was stepping away, his foot was caught in the hole in the plank, and he could not get it out before the wheel of the tender ran over his leg, and so injured it that amputation became necessary; that the hole was partly filled by a knot, upon which he stepped, and which went down, and, as he pulled up his foot, the knot caught it, and he could not get it out; that after making the signal for the engineer to back his engine he made no signal for him to stop; that he thought he should have time to get out the pin and get away before he got to the crossing; that he did not get away before he got to the plank because he had not time, but he did not recollect whether the pin stuck; that he did not think anything about the hole at that time; that the mode of uncoupling trains which was adopted by him was a prudent one; that there was no other mode of uncoupling them; that at this point it was an ascending grade, and the engine had to ease back, and that he could not have pulled out the pin if the cars had been still, unless the engine eased back, and that it would have taken some little time to stop the cars by the brake, and then ease up by backing the engine, and take out the pin.

There was also other evidence as to the speed of the train, and the safety of the plaintiff's method of uncoupling the cars.

The judge ruled that upon this evidence the plaintiff could not recover, and a verdict was accordingly returned for the defendants. The plaintiff alleged exceptions.

H. W. BISHOP, for plaintiff.

J. D. COLT (T. P. PINGREE, JR., with him), for defendants.

Bigelow, Ch. J.—There can be no doubt of the liability of the defendants to respond in damages to a party injured by reason of a defect in the highway caused by their misfeasance or nonfeasance. Every one who creates an obstruction to travel, by erecting barriers, making excavations or otherwise, in a public way, is guilty of causing a nuisance, and if special damages are thereby occasioned an action will lie against him. The remedy which the statute gives for such injuries against towns is only cumulative or additional to that which the party injured has at common law against the person by whose agency the obstruction or defect was caused or permitted to continue. 2 Chit. Pl. (6th Amer. ed.) 599; Lowell, *Inhabitants of, v. Boston & Lowell R. R. Corp.*, 23 Pick, 24, 33.

We think it equally clear that the defendants are not relieved of this liability to the plaintiff by reason of any relation which subsisted between him and them at the time of the accident, arising out of the employment in which he was engaged. In the first place, on the facts reported in the exceptions, it does not appear that he was employed in any duty or service for or in behalf of the defendants.

On the contrary, it is stated that he was in the employment of another corporation. The only connection shown to exist between the parties to this suit is, that the corporation by which the plaintiff was employed had a right to use a portion of the tracks of the railroad belonging to the defendants for certain specific purposes, by virtue of a contract, the precise terms of which are not declared, and that the plaintiff, when the accident happened, was actually engaged in using one of these tracks in making up freight trains, which was one of the objects for which the defendants allowed their road to be used under the contract referred to. On these facts, it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant against a common employer can have any bearing on the rights of the parties to this action. The case is not unlike that put by way of illustration in *Farwell v. Boston & Worcester R. R.*, 4 Met. 49, 61, 15 Am. Neg. Cas. 407, *ante*, of a railroad owned by one set of proprietors, whose duty it was to keep it in repair, and used by another set of proprietors with engines and cars, paying toll to the owners of the road. In such case, the inti-

mation of the court is very strong that a servant in the employment of the last-named proprietors would have an action against the former for an injury caused by the negligence of one of their servants.

But, in the next place, a decisive answer to this ground of defense is, that it does not appear that the defect in the road, which was the proximate cause of the accident, was the result of any such negligence of a servant of the defendants, that they would be excused from liability. It was caused by a want of repair in the superstructure or roadbed between the tracks of the defendant's road, where it crossed the highway. In other words, the defendants neglected to keep a portion of their road, where it was necessary for the plaintiff to go in the discharge of his duties, in a suitable and safe condition, so that he could not pass over it without incurring the risk of injury. Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury. Thus an owner of a steamboat would be liable to an engineer or workman in his employment for an injury occasioned by the use of a boiler which was clearly defective and insufficient. So a manufacturer would be subjected to a like liability by the use of imperfect or badly constructed machinery. And in like manner the proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularity and precision. The distinction on which this rule of law is founded is an eminently wise and just one. It is like: A workman or servant, on entering upon any employment, is supposed to know and assume the risks naturally incident thereto; if he is to work in conjunction with others, he must know that the

carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and, besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows, or ought to know, that no amount of care or diligence by his master or employer can by any possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged. It is certainly most just and reasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequence of which he ought in justice and sound reason to be responsible.

Such, we understand, to be the rule of law, and the principles on which it is founded, as now fully established by authority. *Seaver v. Boston & Maine R. R.*, 14 Gray, 466; *Cayzer v. Taylor*, 10 Gray, 274, 282, and cases cited in note (1).

The case at bar, if the plaintiff could be justly regarded as in the employment of the defendants, clearly falls within that branch of the rule under which the employer is held responsible for injuries caused by the use of improper or defective means for the proper performance of the work or duty to be rendered by those engaged in his service. The place where the accident happened was intended to be used for the purpose of making up trains. It was necessary for the person whose duty it was to unshackle the cars, or to fasten them together, to pass and repass over the space covered with plank between the tracks frequently and with rapidity, and with his attention in great degree diverted from the surface over which he

1. See *Seaver v. Boston & Me. R. R.*, 14 Gray, 466, on the point as to when the relationship of master and servant commences. *Cayzer v. Taylor*, 10 Gray, 274, is reported with the Massachusetts cases in this volume, page 500, *post*.

passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. The existence of such a defect as the evidence disclosed at the trial being of a nature to obstruct the plaintiff in passing safely and rapidly over and between the tracks, and to hinder him in the performance of the service in which he was engaged, tended very strongly to show that the defendants had committed a breach of the implied obligation which rested upon them to provide a suitable place in which the plaintiff could perform his duty safely, in the exercise of due and reasonable care, and without incurring a risk which did not come within the scope of his employment. The omission of the defendants was analogous to a failure on their part to have and maintain safe and suitable tracks, switches or turnouts, or to construct and keep in repair staunch and sufficient bridges. For such failure or omission they would be clearly liable in damages to a person in their employment who might be injured thereby, according to the principles and authorities already referred to. As the case stood, therefore, at the trial, there was evidence offered by the plaintiff which tended very strongly to show that the defendants had been guilty of negligence and a breach of duty, which would render them liable to the plaintiff in this action.

It is urged by the counsel for the defendants that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that the planks across the highway were kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow-servant. But this argument leaves out of sight the real ground on which the liability of the defendants rests. If the argument is well founded, then it would follow that, as a corporation can act only by agents or servants, it would escape all responsibility for every species of injury caused by defective machinery and apparatus, or badly constructed tracks, or insufficient bridges and other similar causes. So an individual could avail himself of a similar immunity, if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has been already said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and

maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty. But it does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient.

The only remaining question is, whether there was anything in the acts or conduct of the plaintiff, at the time he received the alleged injury, which showed a want of due care on his part, sufficient to defeat his right to recover damages, and to warrant the court in withholding the case from the consideration of the jury. We think it very clear that there was not. There is a class of cases involving the question of the exercise of proper care on the part of a plaintiff, in which it is not only the right but the duty of the court to decide as a matter of law that the plaintiff has failed to maintain his action, and to direct a verdict for the defendant. These are cases where, upon the uncontradicted evidence, it appears that the plaintiff was guilty of a want of due care, and thus fails in proving an essential legal element in his case. In such an aspect of the evidence, it is the duty of the court to pronounce on its legal effect. It is certainly difficult, if not impossible, to lay down any general rule which shall be of easy application to every case which may arise. It may be said generally, however, that where the admitted or uncontroverted facts of a case show that the acts and conduct of a plaintiff, at the time of an alleged injury, and contributing to produce it, are such as to indicate, according to the common experience and observation of mankind, a want of due and reasonable care, adapted to the circumstances in which he is placed, he does not show any legal cause of action, and it is the duty of the court in such a state of the proof to direct a verdict for the defendant. Of this character are all the cases heretofore decided in this court, where such course has been pursued. In *Lucas v. New Bedford & Taunton R. R.*, 6 Gray, 64, 3 Am. Neg. Cas. 735, the plaintiff was injured while attempting to leave a train after the locomotive had begun to move it. A similar state of facts was proved in *Gavett v. Manchester & Lawrence R. R.*, 16 Gray,

501, 3 Am. Neg. Cas. 742. In *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; s. c., 7 Allen, 207, 9 Am. Neg. Cas. 448, a passenger was injured in consequence of having protruded his arm outside of the window of the car while the train was in rapid motion. In *Gahagan v. Boston & Lowell R. R. Co.*, 1 Allen, 187, 9 Am. Neg. Cas. 447ⁿ, a traveler on the highway undertook to pass between cars in motion, propelled by an engine, having no sufficient reason for making so hazardous an attempt. In all these cases the conduct of the plaintiffs was inconsistent with that degree of common care and prudence which men ordinarily adopt when placed in similar circumstances.

But the case at bar falls within a different category. The plaintiff, when the accident occurred, was in the performance of a duty or service which required him to step between the cars and the engine of a train, for the purpose of uncoupling them by drawing the bolt which held them together. This, it appears, could not be done when the train was standing entirely still, but it was necessary for the engine to move so as to loosen the bolt sufficiently to enable him to withdraw it from its socket, and he was engaged in performing that service in the usual and ordinary mode, when he was thrown down by reason of the defect in the road. A case of this sort is not within common observation and experience, and can not be judged of by the ordinary rule or standard applicable to persons who are only passengers or travelers, and who are engaged in no special or particular service. If, for example, a passenger should meet with an injury in attempting to pass from one car to another while the train was going at a high rate of speed, his act would be deemed by every one an imprudent one, and so manifestly wanting in proper care that he could not recover damages from the railroad company, although some negligence or want of due care on their part might have contributed to the injury. But if a conductor of a train, whose duty it is to pass from one car to another, should while doing so meet with a similar accident from a similar cause, it could not be properly said that he was guilty of negligence in passing from car to car while the train was in motion. That he was required to do by the nature of the service in which he was engaged; and the question of negligence would depend on other considerations, growing out of the peculiar circumstances of the case. So, in the case at bar, if the plain-

tiff had been a traveler or bystander, and without any sufficient reason or excuse had gone between the car and engine when they were in motion, and had there received an injury, it would be too clear to admit of question, that the consequences of any accident which happened to him would fall exclusively upon himself. But as the plaintiff was in the discharge of his duty in placing himself in a perilous position — a duty the performance of which was known to and sanctioned by the defendants — the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him; whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment; and on other considerations of a like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a proper subject of evidence, and should have been submitted with proper instructions to the jury for their determination.

Nor do we think that it was any the less a question of fact to be decided by the jury, because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. *Reed v. Northfield*, 13 Pick. 98; *Smith v. Lowell*, 6 Allen, 40 (1). This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it.

It may be suggested that the plaintiff ought not to recover, because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus after he knew it might cause him bodily harm. But we do not think this case is one of that

1. These were actions against municipalities for personal injuries occasioned by dangerous condition of streets.

class. His continuance in the employment did not necessarily and inevitably expose him to danger.

On the whole case, as presented to us, we are of opinion that the verdict for the defendants should be set aside, and a new trial granted.

RAILROAD EMPLOYEE THROWN FROM CAR BY SUDDEN START OF ENGINE—NEGLIGENCE OF FLAGMAN AT CROSSING—INTOXICATION OF NEGLIGENT SERVANT—EVIDENCE—RAILROAD COMPANY LIABLE.—In *GILMAN v. EASTERN R. R. CO.*, 13 Allen (95 Mass.) 433 (*November, 1866*), carpenter in defendant's employ while riding with other workmen on a platform car injured by being thrown down by sudden start of engine, due to alleged negligence of flagman at crossing, defendant's exceptions to verdict for plaintiff for \$9,000 were overruled and judgment rendered on the verdict. The opinion was rendered by GRAY, J., and the rulings are stated in the syllabus to the official report as follows:

"If a flagman employed by a railroad corporation is an habitual drunkard, and is usually intrusted with the management of a switch, and these facts are known or, by the use of due care, would be known by the officers of the corporation, and he through intoxication fails properly to adjust a switch, whereby an accident happens to a person employed by the corporation to repair its cars, the corporation will be responsible in damages; although due care was used in the original selection of the flagman, and a proper local agent is employed with authority to hire and superintend such servants as may be necessary, and by the rules of the company it is the duty of another person to manage the switch.

"If a person employed by a railroad corporation at the time of an accident alleged to have been caused by his negligence was an habitual drunkard, evidence that he was generally reputed to be so in the place where he lived is competent, for the purpose of showing that his intemperate habits ought to have been known to the officers of the corporation."

See, also, former decision in the *Gilman* case, reported in 10 Allen, 236. In referring to this decision Judge Gray said: "The rules of law are now well settled, and were affirmed in the opinion already given in this case, and reported in 10 Allen, 236, that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect." * * *

ENGINEER INJURED BY EXPLOSION OF LOCOMOTIVE BOILER—LAW OF MASTER AND SERVANT—INSTRUCTIONS—RULES AND REGULATIONS—RAILROAD COMPANY LIABLE.—In **FORD v. FITCHBURG R. R. CO.**, 110 Mass. 240 (*October Term, 1872*), locomotive engineer injured by the explosion of the boiler of the engine which he was running, defendant's exceptions to verdict returned for plaintiff were *overruled*. The official report sets out, at length, the evidence given on the trial, defendant's requests to charge, the trial court's instructions, etc. In rendering the opinion of the Supreme Court, JUDGE COLT said:

"This action is founded on the alleged negligence of the defendant corporation in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as locomotive engineer upon its road. The law applicable to cases of this description, and which defines the rights and duties that belong to the relation of master and servant, is plainly stated in the recent decisions of this court. The principles are discussed and the cases sufficiently reviewed in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, and in *Gilman v. Eastern Railroad Co.*, 10 Allen, 233, and 13 Allen, 433, 15 Am. Neg. Cas. 426, *ante*, and *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 15 Am. Neg. Cas. *post*.

"Upon a careful consideration of the evidence and the instructions given, we find no error in law for which this verdict should be set aside. The legal principles which govern the case were accurately stated. They were well adapted to the whole evidence in its different aspects, and they were all that the case required. The jury, who are presumed to have been controlled by these instructions, and the evidence before them, must have found, in arriving at their verdict, that the defendant corporation, by its agents, intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; and that the plaintiff was himself in the exercise of ordinary care and diligence, in the use of the engine, and in avoiding danger therefrom. They must have further found, that the plaintiff did not know, or have reasonable cause to believe that the engine was unsafe at the time of the explosion, and also that the injury was not, in whole or in part, caused by any violation of the terms of his contract of employment, as expressed in the rules of the road assented to by him." * * *

Continuing, the Court said: "There was no error in refusing to instruct the jury as specifically requested. The first ruling asked would absolve the defendant from any duty to the plaintiff, in case

of his violation of any rule which he had agreed to observe. Such violation would perhaps justify the defendant in putting an end to the relation, if it saw fit. But until so terminated, the defendant must be held to the legal responsibilities assumed.

"The second instruction asked, as to the effect of the rules referred to, in imposing the sole responsibility upon the plaintiff, was not warranted by their true meaning (1). Rule 28 clearly refers to accidents on the road which would make it unsafe to proceed; and Rule 42 imposes upon the engineer the duty of seeing

1. The rules referred to in the Ford case (the case at bar), and put in evidence on the trial of the case, are as follows:

"1. Right of Road. Whenever there is the slightest doubt as to the right to the road, or to the safety of proceeding, the prudent course must invariably be adopted; and signals must be exhibited in each direction, when necessary, at a sufficient distance to guard against even the possibility of danger."

"27. Accidents on the Road. In case of accident, or when a train is unable to proceed at the required rate of speed, or is delayed or stopped from any cause, excepting only the regular stops made on time at stations, a man, provided with suitable instructions and signals, must immediately and always be sent out in one or both directions, as may be necessary, to stop any trains which may be approaching. This must always be done (whether any train is known to be approaching or otherwise) at all times and in all places, however brief the stoppage or detention; and such signal men must be kept out until it is perfectly safe to recall them. Both conductors and enginemen will be held responsible for the strict observance of this regulation. In sending for assistance, it must be stated explicitly what is needed, and the nature of the accident.

"28. Whenever the nature of the accident or detention is such that the train may be delayed a considerable

time, additional men must be immediately sent to the nearest station, in one or both directions, as may be necessary, to stop all approaching trains, and immediate notice given, by telegraph or otherwise, to the master mechanic and superintendent. Whenever any defect is detected in a locomotive that would make it, in the judgment of the engineer in charge, unsafe to proceed, he will immediately draw his fire, station his signal men, and then procure assistance from the nearest possible point, by telegraph, or otherwise; at the same time, as early as practicable, inform the master mechanic thereof."

"42. Steam Pressure. Enginemen are held responsible for the condition of their engines, and must be sure that they are in good working order before they are taken from the engine-house. They must know that their engines are supplied with requisite fuel and water; tools, including iron bar, jacks, saw, hatchet, chain, rope, duplicate spring hangers, bolts, nuts, keys, etc.; also with red flags, red lanterns, and also with torpedoes suitably protected from the weather; and in all cases of danger they will freely use the torpedoes, in addition to the other signals, but must not in any event trust to them entirely. Hereafter no enginemen must, without the consent of the master mechanic, use a steam pressure of more than one hundred and twenty pounds, and will be upon duty upon his engine when the same is in motion."

that his engine is in good working order. The jury were told that the first of these rules did not relieve the defendant from responsibility for internal invisible defects in the boiler, and that the last would not preclude the plaintiff from recovering, unless the injury complained of was occasioned, in whole or in part, by such violation; but that, if the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe, he could not recover.

"As to the third, fifth and sixth rulings asked, it is plain that the plaintiff's knowledge that the engine was not in good working order, and was to some extent defective, is not conclusive evidence of want of due care on his part. It was for the jury to consider on the question of the alleged contributory negligence of the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing it, and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover. The fact that it was in violation of an express rule is not material, unless such violation was a direct cause of the injury. *Clarke v. Holmes*, 7 H. & N. 937.

"The fourth and seventh requests, so far as they differ from the instructions given, were deficient. The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same, and no sound distinction can be established in favor of the defendant on this ground; and for the rest the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use.

"The ninth and tenth instructions asked assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence, of the officers named. The instructions given were all that were required."

The requests to charge and the instructions given on the trial of

the FORD case, *supra*, referred to in the opinion (preceding paragraphs) were as follows:

The defendants asked the trial judge to give the following rulings: "1. The rules of the defendants, under which the plaintiff worked, constituted a part of the contract of his employment, and any intentional violation of any of them by him would deprive him of any rights arising from the relation in which he stood to the defendants, so long as such violation continued. 2. Under the rules of the defendants, which prescribed the duty and ascertained the rights of the plaintiff, in respect to the operation of his engine, he was the absolute judge of whether, at any time, the engine was safe to proceed, and was in good running order; and in respect to those questions was wholly independent of Cooledge or Maddox, or any other employee of the defendants. 3. If the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe (or not in good working order) he cannot recover. 4. If the defendants used reasonable care originally in furnishing a suitable and safe engine for their road, and in putting the same into the hands of fit and suitable agents to be kept in repair, they are not liable in this action for injury caused by any defect or want of repairs therein subsequently existing. 5. The plaintiff's knowledge, as shown by the evidence in this case, of the defective condition of the engine, and his continuing to use the same after such knowledge, is conclusive evidence of a want of due care on his part. 6. The plaintiff's knowledge that the engine was not in good order, and his using the same with such knowledge, is conclusive evidence of want of due care on his part; and if such knowledge and such use by him is proved by the evidence, he cannot recover. 7. The defendants are not liable in this case unless the plaintiff proves that the president, directors or superintendent either personally knew, or by the exercise of reasonable care in the performance of their duties, might have known of the existence of the defect in the engine, which caused the explosion; or unless the plaintiff proves that the president, directors or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known, that the person or persons employed to have the charge of the engine and keep it in repair were incompetent; and further proves that such incompetency caused the accident. 8. If the plaintiff violated any of the rules, and the accident would not otherwise have happened, he cannot recover. 9. Although Cooledge and Maddox failed, through incompetency, to make such examination of the boiler as the bulge in the back head, the condition of the stay-rods or throttle reasonably called for, and although, had they made such examination, the cause of the accident would probably have been discovered and the same prevented, still the defendants are not liable on that account. 10. The master mechanic was a

fellow-servant of the plaintiff, and the defendants are not liable for the negligence, if any, of the master mechanic in failing to keep the engine in repair."

These rulings the trial judge refused to give, except the third, which he gave, omitting the words in brackets.

The trial judge, at the request of the defendants, also gave the following ruling: "If the plaintiff ran the engine when it was not in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion, by which the plaintiff was injured, and a competent engineer ought to have known that such particulars were signs of such defective condition, and the plaintiff held himself out as such a competent engineer when he entered into the employment of the defendants as an engineer, he cannot recover."

The judge instructed the jury as follows: "A person entering into the service of another takes upon himself, in consideration of the compensation to be paid him, the ordinary risks of the employment, including the negligence of his fellow-laborers." "The general rule is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, embracing perils arising from the negligence of those in the same employ as incident to the service." "When a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." "A corporation is required to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfil this obligation, whether it arises from its own want of care, or that of its agents intrusted with the duty. But the law does not hold it responsible for the negligence of its servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." "The rules of law are well settled, that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants, to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exer-

cise, both in procuring and in keeping and maintaining such servants, structures and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. For the management of his machinery and the conduct of his servants, he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility, when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty, to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business."

"The obligation of a corporation, so far as respects those in its employment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant such as men of ordinary sense, prudence and capacity, under like circumstances, take in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business."

"Applying the law as stated to the present case, the judge instructed the jury that 'the exercise of ordinary diligence and care was required on the part of the defendants, and their proper officers and agents, in providing a suitable engine to be used by the plaintiff upon their road, and in keeping the engine in proper condition for such use; that the plaintiff was also required to exercise ordinary diligence and care in the use of the engine and in avoiding danger therefrom; that if neither party was in fault the plaintiff could not recover; that if the injury complained of was occasioned by the fault or negligence of both parties, the plaintiff was not entitled to recover; that if the defendants, acting by their proper officers and servants, exercised ordinary diligence and care in providing a suitable engine and in keeping the same in proper condition and repair, for the use to which it was appropriated, they were not responsible for the injury complained of; but that if they failed so to do, and the injury complained of resulted from their neglect in this respect, then the defendants were responsible there-

for, unless it appeared that the plaintiff himself was also wanting in the exercise of ordinary vigilance and care, either in the management of the engine, or in improperly exposing himself to danger therefrom, thereby rendering himself guilty of contributory negligence, in which latter case he was not entitled to recover; that the burden was upon the plaintiff to show, not only that the defendants were guilty of negligence in not exercising ordinary diligence and care in providing a suitable engine, and in keeping it in proper condition, thereby causing the injury complained of, but that he was himself free from any negligence contributing to the injury; that Rule 28 did not, as a matter of law, release the defendants from their legal responsibility in this case, if any such existed, for the internal and invisible defects in the boiler, by which it was claimed the explosion was occasioned; and that the violation of Rule 42, so far as it stated it to be the duty of the plaintiff to be sure that the engine was in good working order before it was taken from the engine-house, did not, as matter of law, necessarily preclude him from recovering in this case, if otherwise entitled, unless the accident or injury complained of was occasioned in whole or in part by such violation."

DANGEROUS OBSTRUCTION NEAR TRACK—FALL OF EARTH UPON DERRICK AND GUY ROPE STRIKING BRAKEMAN ON PASSING FREIGHT TRAIN—CASE FOR JURY.—In **HOLDEN v. FITCHBURG R. R. CO.**, 129 Mass. 268 (September, 1880), tort for injuries sustained by plaintiff, a brakeman in defendant's employ, it was ordered that the case stand for trial on the following facts offered by plaintiff at the trial in the Superior Court (Worcester):

Prior to June 1876, a public street in Fitchburg had crossed the defendant's railroad by a bridge resting on stone abutments, the railroad at that point passing through a deep cut. In June, 1876, upon the petition of the defendant and others, the city council of Fitchburg discontinued a part of this street, including the part which crossed the railroad, and also laid out and extended another public street on the southerly side of the railroad as a substitute for the discontinued portion of the old street. This action of the city council was taken upon an agreement with the defendant that the latter would do all the necessary work in constructing the extended street, and affecting the discontinuance of the old street, and would pay all damages caused by the extending and discontinuance. In pursuance of this agreement, the defendant employed workmen and proceeded to execute the work, some of which was within and some without the located limits of the railroad. The object of the defendant was to widen its railroad at and near the crossing, and to lay additional tracks.

At the time of the plaintiff's injury the defendant was engaged in widening its railroad at a point where it was crossed by the old street in Fitchburg, for the purpose of laying additional tracks. In the execution of the work the defendant's workmen had occasion to use a derrick owned and furnished to them by the defendant, for the purpose of removing the abutments of the bridge, and for building a supporting wall to the newly extended street, and for building other walls partly within and partly without the located limits of the railroad. At the time of the injury a portion of the abutments of the bridge had been removed, leaving the bank, consisting of earth and stones, on the north side of the track, and in plain view thereof, overhanging and projecting, and of a height of about seventeen feet. Several days before the accident, the workmen, in pursuance of the work, had set up the derrick on the north side of the track about on a level therewith, within four or five feet of the overhanging bank and within the located limits of the railroad. One guy was stretched across the track to the south side and there fastened, being of sufficient height when the derrick was upright to clear the passing trains. The other guys were fastened on the north side. The derrick was carelessly and negligently set up, the guys not being taut, and it was placed dangerously near the overhanging bank. The plaintiff did not contend that the derrick was not suitable for the work for which it was designed.

The day before the injury was warm, and the bank thawed, and it was obvious to any one who looked at it that a large mass of the bank was loosened, and liable to fall upon the derrick. The derrick had remained in the manner and position above described for a fortnight or more, and for ten days at least before the injury had not been used. The weather had been alternately thawing and freezing during that time. On December 15, 1876, a short time before the train on which the plaintiff was at work came along, a great mass of the bank broke off and fell onto the derrick, breaking it and knocking it down, and bringing the guy stretching across the railroad down in such a position that, when the train came along it tore off the smokestack of the engine and swept over the tops of the cars striking the plaintiff and causing the injury complained of.

The defendant employed a road-master who had charge of that portion and other portions of the railroad, and the general charge and supervision of the repairs and maintenance of the roadbed and tracks; but he had no charge of the work of altering this street, or removing these stone abutments, or digging for the additional tracks, and the men who were doing that work were not under his control. Within ten days before the injury, he passed over the railroad frequently, and knew or had reasonable cause to know the situation of the bank and derrick.

The defendant contended that, if these facts were proved, there

was no evidence of negligence on its part; and that the negligence, if any, was that of fellow-servants of the plaintiff. The judge reported the case, by consent of the parties, before verdict, for the determination of this court. If, upon the above offer of proof the plaintiff was entitled to go to the jury, the case was to stand for trial; otherwise, judgment was to be entered for the defendant. F. P. GOULDING appeared for plaintiff; G. A. TORREY (T. K. WARE with him), for defendant.

The Supreme Court (per GRAY, Ch. J.), after stating the fellow-servant rule, assumption of risk, and the duties of railroad companies in furnishing proper appliances and road-beds for servants, and citing numerous authorities on the points, said:

"If a railroad corporation has suffered a structure, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the structure is in law a nuisance, and the corporation is liable to servants employed upon its passing trains, as well as to other persons, for injuries resulting from its own neglect in not removing the structure, or in guarding against the danger of allowing it to remain in such a place, whether it was originally put there by other servants of the corporation or by strangers, and independently of the question of negligence on the part of those who placed it there.

"In the case at bar, the workmen employed in widening the railroad were fellow-servants of the brakemen on the trains; and it being admitted that the derrick was suitable for the work for which it was designed, and there being no evidence of negligence on the part of the corporation in selecting or instructing the workmen, any negligence of theirs in setting up or using the derrick is the negligence of fellow-servants of the plaintiff, for which the defendants cannot be held liable in this action.

"But the evidence at the trial tended to show that the derrick had remained unused by the side of the track, dangerously near an overhanging bank of earth and stones, in plain view, and with a guy loosely stretched across the track (though at a sufficient height when the derrick was upright to clear the passing trains) for at least ten days while the weather was alternately freezing and thawing; that on the day preceding the night on which the plaintiff was injured the bank thawed, and it was apparent to any one who looked at it that a large mass of the bank was loosened and ready to fall upon the derrick; and that just before the freight train on which the plaintiff was at work came along, such a mass broke off from the bank, and fell upon the derrick, knocking it down and bringing the guy stretched across the track into such a position that

it swept over the top of the train and struck the plaintiff, causing the injury sued for. This evidence would warrant the jury in finding that the defendant corporation had not used the care which the circumstances required to keep the track in a safe condition, and to guard against the impending danger. Case to stand for trial."

LAWLESS v. CONNECTICUT RIVER RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, October, 1883.

[Reported in 136 Mass. 1.]

DUTY OF MASTER TO FURNISH SUITABLE APPLIANCES FOR SERVANT — AGENTS — FELLOW-SERVANTS — DEFECTIVE APPLIANCE — QUESTION FOR JURY — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — BRAKEMAN INJURED COUPLING CARS — DEFECTIVE ENGINE.—It is the duty of a railway company to furnish suitable appliances for its servants, and for neglect of this duty is responsible for an injury resulting to a servant therefrom; and this duty is not necessarily discharged by entrusting it to suitable servants or agents, the company being responsible for the negligence of such agents in respect thereto.

Where suitable servants or agents are entrusted with the master's duty of furnishing suitable appliances they are not the fellow-servants of the employees using such appliances.

If an appliance is suitable for the work required the master is not responsible for an injury to an employee resulting from the manner in which it is used by the latter's fellow-servants.

Whether an appliance is unsuitable for the work required is a question for the jury.

An employee assumes all the ordinary risks incident to his employment.

Whether an injured servant was in the exercise of due care is for the jury to determine from the facts of the case.

So held in action by brakeman for injuries sustained while engaged in coupling a car to an engine, the negligence charged being a defect in the engine.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ as a brakeman, by a locomotive engine alleged to have been improperly constructed. At the trial in the Superior Court, Hampden, before GARDNER, J., the jury returned a verdict for the plaintiff in the sum of \$4,500, and the defendant alleged exceptions. The instructions requested by defendant and refused by the court are set out in the official report, the substance of which is stated in the opinion. *Exceptions overruled.*

G. WELLS, for defendant.

G. M. STEARNS, for plaintiff.

Colburn, J.—The rules of law which are applicable to this case are well settled in this commonwealth.

It was the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plaintiff to perform with it, and to exercise ordinary care in the performance of this duty, and it was responsible to the plaintiff, if he was using due care, for an injury resulting from its negligence or want of ordinary care in this respect. It did not necessarily discharge this duty by entrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants and agents in the performance of the duty required of them. Such servants or agents, in the performance of this duty, were not the fellow-servants of the plaintiff, but were charged with the duty required of the defendant. *Ford v. Fitchburg R. R.*, 110 Mass. 240, 15 Am. Neg. Cas. 427, *ante*; *Holden v. Fitchburg R. R.*, 129 Mass. 268, 15 Am. Neg. Cas. 433, *ante*; *Hough v. R'y Co.*, 100 U. S. 213.

If the engine was suitable for the work for which it was designed to be used and was used, the defendant was not responsible to the plaintiff for an injury resulting from the manner in which it was used by his fellow-servants.

It appeared in evidence that the engine in question was new when it came on the road of the defendant, some three or four months before the accident; that during all the time it had been on the road, it was used as a "switcher;" that it had on the forward end a draw-bar, or bunter, some of the witnesses giving it one name and some the other, the device serving the double purpose of draw-bar and bunter. The only defect claimed in the engine was, that this draw-bar was too low for the purpose for which it was designed and used, so that it was liable to pass under the draw-bar or bunter of the car to which it was to be attached, and did so on the occasion of the accident. Whether the draw-bar was too low, and, if so, whether that rendered the engine unsuitable for the work for which it was designed and used, were questions for the jury.

The plaintiff, by engaging in the work he was doing, took all the risks ordinarily incident to that work. He was bound to exercise such care for his own protection as the kind of work in which he was engaged reasonably required. He had

a right to assume that the defendant had furnished a suitable engine, but if he discovered, or by the exercise of ordinary care ought to have discovered, that the engine was defective because the draw-bar was too low, that was an important element in determining the degree and kind of care required of him in its use. The facts were in dispute. The testimony of the plaintiff was, in substance, that he had not been upon the engine much; that he did not think he had coupled a car to the front of the engine more than four times; that, when the engine first approached the car, it stopped ten feet from it; that he did not notice the height of the car, and did not know there was any danger that the bunter of the engine would pass under that of the car until he actually attempted to make the coupling and got hurt.

On the other hand, the engineer testified that the plaintiff had worked on the engine most of the time it had been in use; that, as the engine approached the car on the occasion in question, the plaintiff jumped out, and the bunter of the engine passed under that of the car; that he had a conversation with the plaintiff about this, and the necessity of using a crooked link, before the attempt to connect was actually made by the plaintiff. There was also other testimony bearing upon these points.

Whether the plaintiff was in the exercise of due care, under all the facts and circumstances which might be found to be established by the evidence, was for the jury. The court was not to pass upon the weight of the evidence, but only to determine whether there was evidence which should be submitted to the jury. *Forsyth v. Hooper*, 11 Allen, 419 (1).

For these reasons, we are of opinion that the defendant was not entitled to the first or second instruction requested.

The fourth instruction requested should not have been given. It does not include the element of knowledge of any difference in height, on the part of the person giving the direction, which would seem to be essential to render him careless. If it had included such knowledge, in giving it the court must practically have held that an employer would not be liable for an injury resulting from the use of an unsuitable machine, which he had negligently furnished for use, unless he personally gave the direction to use it. *Cayzer v. Taylor*, 10 Gray, 274 (2).

1. See *Forsyth v. Hooper*, 11 Allen, 419, on question of independent contractor.
2. Reported with the *Massachusetts* cases in this volume, page 500, *post*.

The third and fifth requests raise substantially the same question, and may be considered together.

We are of opinion that the defendant was not entitled to have these instructions given without qualification. We do not think the existence of the facts supposed would show the plaintiff's carelessness so clearly and beyond all controversy that it should be held, as matter of law, that, if these facts were found, he could not recover, though they might furnish strong evidence of his carelessness. *Snow v. Housatonic R. R.*, 8 Allen, 441, 15 Am. Neg. Cas. 421, *ante*; *Gaynor v. Old Colony & N. R'y*, 100 Mass. 208, 9 Am. Neg. Cas. 439*n*; *Chaffee v. B. & L. R. R.*, 104 Mass. 108, 9 Am. Neg. Cas. 439*n*.

The fact that a person voluntarily takes some risk is not conclusive evidence, under all circumstances, that he is not using due care. *Thomas v. W. U. Tel. Co.*, 100 Mass. 156; *Mahoney v. Met. R. R.*, 104 Mass. 73 (1). The plaintiff was engaged in performing the duty required of him, and it was necessary that the cars should be moved quickly to make way for an expected train. If the plaintiff had the knowledge supposed in the requests for instructions, the question of his due care depended to some extent upon the view the jury might take of his necessity for immediate action, the distance the bunters would have to pass each other before the car and engine would come so near together as to injure him, the speed at which the engine was moving, the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance he was reasonably entitled to place upon his ability to make the connection so as to prevent the bunters passing, and probably other circumstances.

Under all the instructions given, we do not think the jury were likely to be misled.

Exceptions overruled.

1. See *THOMAS v. WESTERN UNION* and *MAHONEY v. MET. R. Co.*, 100 TEL. Co., 100 Mass. 156, on the application of the maxims "*res ipsa loquitur*," and "*volenti non fit injuria*;" and *MAHONEY v. MET. R. Co.*, 100 Mass. 73, on the questions of contributory negligence and assumption of risk.

TRASK V. OLD COLONY RAILROAD COMPANY AND ANOTHER.

Supreme Judicial Court, Massachusetts, May, 1892.

[Reported in 156 Mass. 298.]

BRAKEMAN IN EMPLOY OF ONE RAILROAD INJURED WHILE PASSING OVER TRACK OF ANOTHER RAILROAD—JOINT USE OF TRACK—LICENSE—WAYS, WORKS AND MACHINERY—EMPLOYERS' LIABILITY ACT—STATUTORY CONSTRUCTION.—Where two railroad companies occasionally use the track of each other, but neither company having any control over the track of the other, and an employee of one railroad company is injured while passing over the track of the other owing to an alleged defect in the latter's track, the former railroad company cannot be charged with a defect in its "ways, works and machinery," under the Employers' Liability Act, Stat. 1887, chap. 270, section 1, clause 1 (1).

"TORT, against the Old Colony Railroad Company and the Union Freight Railroad Company, under the St. of 1887, c. 270, by the plaintiff, as widow of one Isaac Trask, to recover for his death, caused on the tracks of the Boston & Maine railroad, in Boston, on May 18, 1890. Trial in the Superior Court, before Barker, J., who, at the close of the evidence, directed a verdict for both of the defendants, and ordered a judgment to be entered for the Old Colony Railroad Company, without prejudice to the right of the plaintiff to prosecute his action against the Union Freight Railroad Company, as though it had been the sole defendant.

"It appeared in evidence that the tracks of the Union Freight Railroad Company were laid upon Causeway street, and from Causeway street through Haverhill street to the end thereof, where the tracks of the Boston & Maine railroad

1. *Employers' Liability Acts.* See the text of the Massachusetts Employers' Liability Act (Rev. Laws, 1902, ch. 106; also Acts 1887, ch. 270) set out, with similar statutes in other American States, and also the English laws on the subject, in 13 AM. NEG. CAS. 857-874.

See, also, numerous cases and notes of cases relating to injuries to railroad employees brought under the

Employers' Liability Act, reported with the Massachusetts cases in this volume of AM. NEG. CAS.

See, also, at end of the case at bar, notes and abstracts of cases in which the question of what constitutes "ways, works and machinery," under the Employers' Liability Act, is passed upon by the Massachusetts Supreme Court.

began. The tracks of the Union Freight Railroad Company were constructed with longitudinal sleepers, connected by cross-ties, upon which were laid the ordinary flat street railway rail. The track of the Boston & Maine Railroad Company was the ordinary steam railroad T-rail track, laid upon cross sleepers, and the two tracks, which were level, physically connected, so that the engines and cars could and did pass from the one to the other.

"The Boston & Maine railroad track was a spur or branch track, extending from its main tracks to the track of the Union Freight railroad, and was used to transfer freight from its main tracks to the track of the Union Freight Railroad Company.

"The track of the latter company was maintained and kept in repair by that company, and the track of the Boston & Maine railroad was maintained and kept in repair by that company. The Union Freight Railroad Company had nothing to do with maintaining or repairing the track of the Boston & Maine.

"The plaintiff's counsel claimed to recover only on account of an alleged defective joint in the Boston & Maine railroad track, by which he claimed that the death of Trask was caused.

"It appeared that cars to be delivered or transferred from the Boston & Maine railroad to the Union Freight railroad were usually placed upon the above-described Boston & Maine track, or the connecting Union Freight track, there being no exact position for them to be placed upon either track. They were sometimes left wholly upon the Boston & Maine, sometimes wholly upon the Union Freight track, and sometimes partly upon each.

"The Union Freight Railroad Company's engine, with its men, would come down upon its track, and connect with and draw out the cars thus left. Generally it could fasten upon the cars without going upon the Boston & Maine tracks, but sometimes it was obliged to go down upon these for that purpose.

"After the engine was fastened to the cars, the brakeman or flagman of the Union Freight men working with the engine, would go over the cars to free or loosen the brakes, and after the connection had been made between the cars and the engine, the engine and cars were wholly managed by the Union Freight employees; and in loosening brakes and bring-

ing out the cars they would have often to be upon cars then on the Boston & Maine portion of the track, and in motion.

"A few feet beyond the end of the Union Freight track, and at the right-hand side of the Boston & Maine track, was a small freight-house, known as the 'little house.'

"On the morning of May 18, 1890, between one and two o'clock, a train of twelve ice cars was standing by the 'little house,' so called, some of the cars upon the Union Freight track towards Causeway street, and some upon the Boston & Maine track alongside of the 'little house,' and some upon the Boston & Maine track beyond the 'little house,' toward the main line.

"In the right-hand rail of the Boston & Maine railroad track coming from Causeway street toward the main line of the Boston & Maine railroad, and about six feet beyond the farther corner of the 'little house,' there was a defective joint. At this joint there was no fish-plate to connect the rails, and the end of the farther rail nearer the main line was about two inches higher than the end of the rail toward Causeway street, and there was a space of about two inches between the ends of the rails.

"There was evidence that the end of the farther rail rested in the chair, of which the spikes were loose and stuck up half their length, and the end of the nearer rail toward Causeway street did not rest in the chair, but was on the ground. The joint was described as old, bad, rusty, dirty, and the spikes and the chair as rusty, and the whole chair as 'loose to kick,' and there was evidence as to what was required in a good joint.

"The dummy of the Union Freight Railroad Company, with a gang of men, consisting of an engineer, fireman, two brakemen, and two flagmen, in charge of a conductor by the name of Grace, backed down on the Union Freight Railroad Company's track on Haverhill street, between one and two o'clock on the morning of May 18, 1890, and coupled on to the train of ice cars above described, for the purpose of drawing them out upon the Causeway street track. Isaac Trask, who was one of these brakemen, got upon the train at the forward end, on the Union Freight track, and went backward along the train throwing off the brakes preparatory to starting; he was seen going along the top of the train toward its rear end, and when he had let off all the brakes on all the cars, and was on the Boston & Maine track, he gave a signal to the fire-

man of the dummy from the rear end for the train to go ahead. No one else was on the top of the cars, but the other trainmen were at their proper stations.

"One Callahan, a brakeman, testified that he was standing on the ground, by the side of the train, just beyond the 'little house;' that soon after Trask gave the signal to go ahead, he gave an order to Trask to signal to stop the train; that at this time Trask was standing on the train, on the side of the train opposite the 'little house,' about the middle of the third car from the rear end of the train; that immediately after giving the signal, Trask went forward on the cars toward the dummy to the forward end of the third car, and the witness heard a noise between the front end of the third car and the back end of the fourth car from the rear of the train, that sounded like the noise of setting brakes; and that the noise appeared to be at a point about fifteen feet back of the farther corner of the 'little house,' toward the Boston & Maine line, and nearly up to the bad joint, as the train moved toward Causeway street, but the witness could not see Trask.

"Callahan further testified, that, immediately after the accident, he examined the brakes between the third and fourth cars where he had heard the noise, and found the brake on the front end of the third car from the rear of the train fully set, and that on the back end of the fourth car partly set. These brakes were arranged with sill steps, so called. The dog and ratchet were on a sill step about ten inches wide, and about eighteen inches below the top of the car; and such brakes could not be set by a man standing on the top of the car, but must be set by one standing on the sill step, in order to work the dog into the ratchet with his foot, as the wheel of the brake was turned; and that after the accident he went back with the fireman, one Burdain, and found Trask's lantern and hat lying near together between the rails of the Boston & Maine track, within a few feet of the joint above described, and almost opposite to it, and about a foot nearer the draw than the joint.

"Burdain testified that he was in the cab of the engine; that he saw Trask get upon the head of the train with a red lantern, and go back over the tops of the cars, throwing off brakes; that when Trask had reached the rear end of the train, Trask gave him the motion to go ahead, and the dummy then started slowly forward toward Causeway street, at a

speed of about one or two miles an hour. After proceeding a short distance, Trask gave him a motion to stop, and almost immediately afterwards he saw Trask's lantern whirl round and disappear; that at the time he had no idea that an accident had occurred, and the motion of Trask's lantern gave him no intimation that anything unusual had happened; that he first knew of the occurrence of the accident when the dummy had pulled up beyond the switch, and the conductor called out to him to stop, and told him that there was something under the train, which afterwards turned out to be Trask's body.

"There was evidence that the ice cars were from fourteen to fifteen feet long, with two wheels at each end, the axles being about three feet from the ends, and that in passing over a bad joint, the cars would give a quick, strong sway and jar, and would be affected more than an ordinary freight car of twenty-eight or thirty feet in length; that the space between the cars was from two and a half to three feet.

"The first blood spot was found on the track about six feet from the joint before described, in the direction in which the cars were moving, and nearly under the farther corner of the roof of the 'little house;' that the body was found on the switch on Haverhill street, on its back, the head toward the left side of the track, as the train was going; that the body was almost cut in two; and that there were spots of blood, etc., between the first place and the place where the body was found.

"There was evidence that Trask was in perfectly good health and sober at the time of the accident; that he had worked as flagman or brakeman, off and on, for about two months, during which time he had repeatedly come in upon this track of the Union Freight Railroad Company, for the purpose of taking cars from the Boston & Maine railroad, and that all the work was night work.

"The judge reported the case to this court for its determination. If the ruling at the close of the evidence was correct, judgment was to be entered on the verdict for the Union Freight Railroad Company; if incorrect, the verdict was to be set aside and a new trial ordered."

F. RANNEY, for plaintiff.

J. H. BENTON, JR., for the Union Freight R. R. Co.

Morton, J.—Without considering the question of due care on the part of the plaintiff's intestate, we think it can not be

held that the defect in the track of the Boston & Maine railroad was a defect in the ways, works, and machinery of the defendant. It may not be necessary, in order to render an employer liable for an injury occurring to an employee through a defect in the ways, works, or machinery, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied. *Roberts & Wallace, Employers' Liability* (3rd ed.), 249, 250. Neither the employer nor any person in his service can be justly charged with negligence as to matters over which they have no control. The phrase, "connected with or used in the business of the employer" (St. 1887, c. 270, § 1, clause 1), can not be taken literally, but when used in connection with ways, works, and machinery must be understood to mean ways, works, and machinery connected with or used in the business of the employer by his authority, and subject to his control. It is especially stated in the report, that the track of the defendant company was maintained and kept in repair by it, and that the track of the Boston & Maine was kept in repair by that company, and that the defendant had nothing to do with maintaining and repairing the track of the Boston & Maine.

It, therefore, appears that the defendant had no authority or control over the tracks of the Boston & Maine. Sometimes, from the position of the cars, the defendant was obliged to go upon the track of the Boston & Maine to get them, though generally it could fasten to them without going on that track. The occasional use by each company of the track of the others, in delivering and taking cars in the course of business, would not, to that extent, make the track of each a part of the ways, works, or machinery of the other. It was permitted for their mutual accommodation, and was merely a license which did not give either any rights in or control over, and which did not impose upon either any obligation respecting the track of the other. The character of the business transacted is to be considered, and it would be unreasonable to hold that each company was bound to leave and take cars at the precise point of connection, at peril, if it did not do so, of making the track of the other part of its ways, works and machinery, and of becoming liable for injuries resulting from any defect in it.

Judgment on the verdict for the Union Freight Railroad Company.

NOTES AND ABSTRACTS OF CASES IN WHICH THE QUESTION OF WHAT CONSTITUTES "WAYS, WORKS AND MACHINERY," UNDER THE EMPLOYERS' LIABILITY ACT, IS PASSED UPON BY THE MASSACHUSETTS SUPREME COURT.

Among the Massachusetts cases relating to injuries to Railroad Employees sustained by alleged defects, etc., in the "ways, works and machinery" of Railroad corporations, and the statutory construction of the Employers' Liability Act relating to "ways, works and machinery, are the following:

Railroad employee knocked off car by a bridge or chute over track between two buildings of a manufacturing corporation — Railroad company a licensee — Track not part of "ways, works," etc., of railroad company.

ENGEL, ADM'X, *v.* NEW YORK, PROVIDENCE & BOSTON R. R. CO., 160 Mass. 260. (*December, 1893*), was decided on the ruling in the TRASK case (preceding case reported herein) and similar cases (KNOWLTON, J., dissenting), and judgment rendered for defendant, the opinion by HOLMES, J., stating the case as follows:

"This is an action brought under Statute 1887, c. 270, section 2, to recover damages for the death of the plaintiff's intestate, through an alleged defect in the condition of the defendant's ways. The question is whether the cause of the accident is within the statute. The deceased was killed by being knocked off a car of the defendant's by a slanting bridge or chute over the track between two buildings of the Washburn and Moen Manufacturing Company in its yard. The track was that company's track, owned, maintained, and repaired by it; the bridge of course was its bridge, and the defendant came on the track only as licensee, or invited under a contract by which it delivered freight in the company's yard on certain terms. A majority of the court are of opinion that this track was no part of the defendant's ways, within the meaning of the statute.

"We could not come to a different result without repudiating the reasoning of *Trask v. Old Colony R. R.*, 156 Mass. 298, 304 [preceding case reported herein], and the tests sanctioned by that case, and by *Coffee v. N. Y., N. H. & H. R. R.*, 155 Mass. 21, 23 [case next reported herein]. See, also, *Regan v. Donovan*, 159 Mass. 1, 3. The track is not provided by the defendant, or subject to its control. In the language of *Roberts & Wallace, Employers' Liability* (3rd ed.), 249, the defendant had not adopted it as his own. We are not dissatisfied with these tests, and we think that neither the language of the statute nor good sense would permit us to hold an employer liable under the Act for defects which he

cannot help, in a place out of his control, to which his employees once in a while may be called for a few minutes. It will be understood that our view by no means requires ownership as a condition of the defendant's liability.

"The words of the Act in section 1, clause 1, are: "Which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways * * * were in proper condition." These words mean that that defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right. They cannot be made clearer by discussing the principles of common-law liability, or by referring to decisions upon a wholly different kind of statute, like *Comm. v. Boston & Lowell R. R.*, 126 Mass. 61.

"Our decision may not leave the plaintiff remediless. If there was a defect, it is possible that there may be a liability on the part of the Washburn and Moen Company. *Finnegan v. Fall River Gas Works*, 159 Mass. 311; *Osborne v. Morgan*, 130 Mass. 102, 104. Judgment on the verdict. KNOWLTON, J., dissented, in a separate opinion." (J. W. KEITH and F. M. FORBUSH, appeared for plaintiff; W. A. GILE, for defendant.)

Brakeman injured by defective brake-wheel of foreign car—Defective car not part of defendant's "ways, works," etc.

COFFEE v. NEW YORK, NEW HAVEN & HARTFORD R. R. CO., 155 Mass. 21 (*November, 1891*), was an action of tort for personal injuries occasioned to plaintiff while in defendant's employ as a freight brakeman, caused by alleged defective brake-wheel of a freight car belonging to another road. It was held that such defective car did not come within the Employers' Liability Act, not being a part of defendant's "ways," etc., but plaintiff's exceptions to verdict for defendant were sustained on ground of exclusion of material evidence on question of inspection.

But see *BOWERS v. CONNECTICUT RIVER R. R. CO.*, 162 Mass. 312 (*October, 1894*), tort, for personal injuries sustained by plaintiff, a brakeman in defendant's employ, where verdict directed for defendant was set aside. It appeared that plaintiff was a yard brakeman in defendant's employ, and while attempting to couple some cars which were backed down against a Delaware and Hudson coal car, the draw-bars slipped by and caught his hand. The car nearest to the coal car was a Michigan Central box-car, and both of them had come over from the Fitchburg Railroad on the morning of the accident, or the previous night. The declaration was in three counts, one at common law and the other two

under the Employers' Liability Act, Statute 1887, c. 270. At the close of plaintiff's evidence on the trial in the Superior Court, Hampshire, before DEWEY, J., the judge, at defendant's request, directed a verdict for defendant, and reported the case for the determination of the Supreme Court. If the ruling was right, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered. J. C. HAMMOND (H. P. FIELD with him), appeared for plaintiff; W. G. BASSETT, for defendant. The opinion of the Supreme Court was rendered by ALLEN, J., as follows:

"Under the first count, which was at common law, the plaintiff had no case for the jury. The common-law duty of the defendant was that of inspection, and there was no sufficient evidence that it had failed to make proper provision for the inspection of the cars. The neglect, if any, was that of a fellow-servant. *Mackin v. B. & A. R. R.*, 135 Mass. 201; *Keith v. N. H. & N. Co.*, 140 Mass. 175; *Coffee v. N. Y., N. H. & H. R. Co.*, 155 Mass. 21 [preceding case reported herein].

"The second count was under Statute 1887, c. 270, and alleged, in substance, that the two cars were defective in not having suitably constructed and adjusted draw-bars and draw-bar pockets, or sockets, whereby the head of one draw-bar slipped out of place and by the other draw-bar, and thereby caused the injury; and that the defects had not been discovered or remedied owing to the negligence of the defendant, or of some person or persons in its employ, intrusted with the duty of seeing that the cars were in proper condition.

"The first question under this count is whether the cars were a part of the ways, works and machinery used in the business of the defendant within the meaning of the statute. They were loaded freight cars, which had come from other railroads, and which were to be hauled over a part of the defendant's railroad for the transportation of the freight contained therein, in the due course of the defendant's business. For the time being they were used in the defendant's business as a part of its rolling stock. The fact that the defendant did not own them is immaterial. The defendant was not bound to use them in its train, if, on inspection, they were found to be unsafe. We think cars so used must be deemed to be a part of the defendant's works and machinery. *Coffee v. N. Y., N. H. & H. R. R.*, 155 Mass. 21 [preceding case reported herein]; *Gottlieb v. N. Y., L. E. & W. R. R.*, 100 N. Y. 462; *Fay v. Minn. & St. L. R'y*, 30 Minn. 231.

"This is now so established by Statute 1893, c. 359, passed since the plaintiff's cause of action arose.

"We have, then, to consider whether there was any evidence for the jury of a defect in either car, which had not been discovered or remedied owing to the negligence of any person in the service

of the defendant intrusted with the duty of seeing that the cars were in proper condition. It has heretofore been held by us that a draw-bar of a locomotive engine, if placed too low, may be a defect. *Lawless v. Conn. River R. R.*, 136 Mass. 1 (15 Am. Neg. Cas. 436, *ante*). In the present case the alleged defect is that there was an opportunity for too much lateral motion of the draw-bars, and especially of the draw-bar on the stationary car. The evidence of a defect in this particular certainly strikes us as slight, but too much space for play may be a defect, and we cannot say that it clearly appears, as matter of law, that there was no evidence for the jury.

"If it is assumed that there was evidence for the jury of a defect, there was also evidence tending to show that the failure to discover or remedy it was negligence on the part of the defendant's inspectors of cars.

"We cannot say that the plaintiff clearly appears to have brought the accident upon himself by his own carelessness, or that he must be held to have assumed the risk, or that he was not entitled to go to the jury on these questions.

"Upon the second count, therefore, we think the plaintiff is entitled to a new trial.

"Upon the third count there was no evidence for the jury, there being no evidence of negligence on the part of any superintendent or person exercising superintendence for the defendant. Verdict set aside as to second count."

Railroad laborer scalded by steam from locomotive stalled in roundhouse—Locomotive engine stalled in roundhouse for repairs is not "upon a railroad" within meaning of statute.

In *PERRY v. OLD COLONY R. R. CO.*, 164 Mass. 296 (*September, 1895*), tort, for personal injuries sustained by plaintiff, a laborer in defendant's roundhouse, by being scalded with steam and hot water from a locomotive engine, defendant's exceptions on verdict returned for plaintiff were sustained. The syllabus to the official report states the case as follows: "The fact that the foreman of repairs in a roundhouse of a railroad corporation did not notify the engineer or fireman of a locomotive engine, which was stalled in the roundhouse for repairs, that he had sent A., a laborer in the employ of the corporation, under the engine to do some repair, they knowing that some one would be sent, and it not being customary to give such notice, or the fact that he did not notify A. that the engine would have to be blown down before the repair was made, and that this was as likely to be done in the roundhouse as elsewhere, A. being aware of both these things, show no negligence on the foreman's part upon which to found an action against the corporation under the Employers' Liability Act,

Statute, 1887, c. 270, for injuries occasioned to A. by being scalded with steam and hot water blown from the engine while making the repair in question." *Held*, also, that: "A locomotive engine which is stalled in the roundhouse for repairs is not 'upon a railroad' within the meaning of the Employers' Liability Act, Statute 1887, c. 270, section 1, clause 3." Opinion by MORTON, J.

**Railroad employee caught by wire on track and run over by train —
Electric wires on track are part of "ways, works and machinery."**

In *BROUILLETTE v. CONNECTICUT RIVER R. R. Co.*, 162 Mass. 198 (*October, 1894*), tort, under the Employers' Liability Act, Statute 1887, c. 270, for personal injuries sustained by plaintiff while in defendant's employ, plaintiff's exceptions on direction of verdict for defendant in the Superior Court, Hampden, were *sustained*. It appeared that plaintiff was crossing the down main track, on the way to defendant's paint shop, and, while attempting to get out of the way of the trains, his foot caught upon a wire and he fell down and was held by the wire in such a position that a train ran over his foot, necessitating amputation. The wire was part of defendant's electric signal system. The Supreme Court (per ALLEN, J.) rendered the following opinion:

"There is no doubt that the wires were a part of the ways, works and machinery of the defendant. The grounds chiefly relied on by the defendant for sustaining the ruling made at the trial are, that, on the evidence, the plaintiff himself was charged with the duty of keeping the electric system in repair; that, if there was any fault with the wires, it was in part, at least, owing to his own negligence; that there was no evidence showing a violation of any duty which the defendant owed to the plaintiff, even if the wire was out of place; that it was not necessary that he, on his way to his work, should pass up through the yard, or, at any rate, that he should walk between the two main tracks; that in crossing the track he was not in any place where he was expected to be, in the performance of his duty; that the defendant was not bound to keep the track in such a condition that it would be safe and convenient for him to cross at that place, and that it is not reasonable to hold that the defendant's supervision of repairs on the roadbed should extend to such details.

"It seems to us that the plaintiff was entitled to go to the jury upon all of these questions. They all involved matters of fact, upon which the evidence was not so clear and undisputed as to enable a judge to dispose of the case as a matter of law.

"The evidence of previous boasts by the plaintiff as to his ability to keep out of the way of trains and not get hurt was competent, as bearing upon the question of his carefulness or readiness to take risks. Exceptions sustained."

RAMSDELL v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, February, 1890.

[Reported in 151 Mass. 245.]

DEATH OF EMPLOYEE — ADMINISTRATOR'S RIGHT OF ACTION EMPLOYERS' LIABILITY ACT — STATUTE CONSTRUED.— The statute of 1887, chapter 270, section 1, clause 3, commonly called the Employers' Liability Act, does not give the administrator of a deceased employee a right of action on account of the death of his intestate, in addition to his right, as legal representative, to recover the damages which accrued to the intestate in his lifetime (1).

TORT by the administrator of the estate of one McGoldrick, for causing his death. The declaration, as amended, was as follows:

"And the plaintiff says that on the 3d day of January, 1889, his intestate received personal injuries, in consequence of which

1. See, also, the following cases bearing on the rulings in the Ramsdell case (the case at bar) upon the statutory construction of the statutes therein referred to:

In *HODNETT v. BOSTON & ALBANY R. R. Co.*, 156 Mass. 86 (February, 1892), plaintiff's exceptions were *overruled*. The Supreme Court (per ALLEN, J.) said: "This action is brought by the plaintiff as next of kin of the deceased, under the statute of 1887, c. 270, section 2, which provides that 'where an employee is instantly killed, or dies without conscious suffering, * * * the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages,' etc. The employee was not instantly killed. It was therefore incumbent on the plaintiff to prove that the deceased died without conscious suffering, and also that she at the time of his death was dependent upon his wages for support. We are of opinion that the evidence

did not sustain this burden in either particular." * * *

In *DACEY v. OLD COLONY R. R. Co.*, 153 Mass. 112 (January, 1891), two actions of tort, by the administratrix of the estate of John H. Dacey, verdict in one action was set aside as the case should have been submitted to the jury, and in the other action judgment was rendered on the verdict for defendant. The first case was brought under the Statute of 1887, c. 270, section 1, clause 3, to recover for personal injuries occasioned to the intestate, a brakeman in defendant's employ, while he was in the exercise of due care, through the alleged negligence of a person in the service of the defendant, who had charge of a locomotive engine or train upon its railroad, in leaving a car standing so near a moving train which the intestate was getting upon that there was not sufficient room for his body to pass. The second action was for causing the death of the plaintiff's intestate, and was brought under Pub. Stat. c. 112, section 212, and chapter

he died after a few hours; said personal injuries being received while his said intestate was in the defendant's employ, and engaged in the discharge of the usual duties of his employment upon the defendant's premises, at or upon 'the farm,' so called, in Boston, and in the exercise of due care, by reason of a defect, of which said intestate was ignorant, in the condition of said defendant's track, frogs, guard-rails and switches, ways, works,

243 of the Acts of 1883, in amendment thereof, for the benefit of the next of kin. It was held that such an action could not be maintained where the death of an employee was caused by the negligence of a fellow-servant. The opinion in each case was delivered by KNOWLTON, J.

In *CLARK, ADM'R, v. NEW YORK, PROVIDENCE & BOSTON R. R. Co.*, 160 Mass. 39 (October, 1893), railroad employee fatally injured while coupling cars in freight yard, judgment of the Superior Court sustaining demurrer to declaration was *affirmed*. The opinion rendered by the Supreme Court (per ALLEN, J.) is as follows: "The plaintiff concedes that he can not maintain an action under Pub. St. c. 112, section 212, amended by St. 1883, c. 243, because the negligence set forth was only that of a fellow-servant of the plaintiff's intestate, and his intestate, if he had survived, could not have maintained an action. *Dacey v. Old Colony R. R.*, 153 Mass. 112, 117 [see preceding paragraph]. It is also plain that no recovery could be had by the present plaintiff as administrator under the Employers' Liability Act, St. 1887, c. 270, because where, as in this case, death resulted without conscious suffering, the only action that can be maintained is in the name of the widow or dependent next of kin. *Ramsdell v. N. Y. & N. E. R. R.*, 151 Mass. 245 [the case at bar]. But the plaintiff contends that the combined effect of both statutes is to give an action to the administrator, free from the

defense arising out of the relation of fellow-servants, in a case where death has resulted without conscious suffering, and where there is no widow nor dependent next of kin. We do not think so. The rights of action, in addition to those already existing, which are given by the Employers' Liability Act, are limited to the cases specified in that act. *Dacey v. Old Colony R. R.*, *supra*. Judgment affirmed." (F. B. SMITH, appeared for plaintiff; W. A. GILE, for defendant.)

In *JONES v. BOSTON & ALBANY R. R. Co.*, 157 Mass. 51 (June, 1892), it was held (as per syllabus to the official report) that "An action under the statute of 1887, c. 270, against an employer for the instantaneous death of an employee, by the latter's widow, is supported by a notice, in the form required by the statute, as amended by the statute of 1888, c. 155, given by the administrator of the employee's estate within thirty days after his appointment."

The case of *DICKERMAN v. OLD COLONY R. R. Co.*, 157 Mass. 52, was delivered on the same day as the Jones case, and was held to be governed by that case. See the Jones case [preceding case].

On the same point, see *DALY v. NEW JERSEY STEEL & IRON Co.*, 155 Mass. 1.

See, also, *GUSTAFSEN v. WASHBURN & MOEN M'FG Co.*, 153 Mass. 468.

See, also, *KEARNEY v. BOSTON & WORCESTER R. R. CORP.*, 9 Cush. (Mass.) 108, and *HOLLENBECK v.*

and machinery, which defect arose from, and had not been discovered and remedied owing to the negligence of the defendant, or of some person in the service of said defendant intrusted with the duty of seeing that such tracks, frogs, guard-rails and switches, ways, works, and machinery were in proper condition. And further, that said injuries were caused by reason of the negligence of some person in the service of the defendant intrusted with and exercising superintendence, whose sole and principal duty was that of superintendence, the said intestate being at the time said accident happened in the

BERKSHIRE R. Co., 9 Cush. (Mass.) 478, on the right of personal representative to recover damages where the intestate lived after the injury sustained by him.

In *GOODES, ADM'R, v. BOSTON & ALBANY R. R. Co.*, 162 Mass. 287 (October, 1894), tort, under Public Statutes, c. 112, section 212, as amended by Statute 1883, c. 243, by the administrator of the estate of John Hopkins, for causing his death, it appeared that plaintiff's intestate was a brakeman in defendant's employ, and that on a certain date, in the nighttime, while engaged in uncoupling cars on a freight train, he struck against a switch-stand, which stood close to the track, and was knocked from the car. There was a verdict for plaintiff, and defendant alleged exceptions. The Supreme Court held that the condition of things was obvious, and the intestate must be held to have assumed the risk incident to the employment. Defendant's *exceptions sustained*. Opinion by MORTON, J.

In *DALEY, ADM'R, v. BOSTON & ALBANY R. R.*, 147 Mass. 101 (May, 1888), two actions of tort, the first for causing the death of the plaintiff's intestate, and the second for his suffering before he died, defendant's exceptions to the verdict returned for plaintiff in each case were overruled. It appeared that plaintiff's intestate was a shoveler, and one of a gang of men who were at work in the hold

of a vessel lying at a wharf with a cargo of coal, there to be delivered for carriage in defendant's cars to a certain point. There was a coal-run upon the wharf under which were several cars of defendant. Upon this coal-run stood a stationary engine, from the drum of which a rope or fall ran to the masthead of the schooner through a block or pulley called a gin, and down through a hatchway into the hold of the schooner. To this fall was attached a large iron bucket which was filled with coal by the gang of shovelers in the hold. One of the gang, called a stage man, stood on a stage projecting from the run, and signaled the engineer of the stationary engine to hoist or lower the bucket, the coal when hoisted being emptied by him into a barrow, wheeled across the run, and dumped into a car standing underneath upon the track. On that day the rope or fall was rotten and unfit for use, and a bucket loaded with coal, while being hoisted thereby, fell and struck Daley, and inflicted injuries from which he died three days afterwards. The wharf, tracks, cars, stationary engine, etc., were the property of the defendant. The Supreme Court, on the foregoing facts, held that the jury were warranted in finding that plaintiff's intestate was in defendant's employ. It was also held (as per syllabus to the official report, the opinion being rendered by DEVENS, J.), that

exercise of due care, and being ignorant of the said negligence of such person. And further, that said injuries were caused by reason of the negligence of some person in the service of the defendant who had charge or control of a signal, switch, locomotive engine, or train, on the said defendant's railroad, the said intestate being at the time said injury happened in the exercise of due care, and being ignorant of the said negligence of such person. And the plaintiff further says, that he has

"the transfer from a vessel to cars of freight to be forwarded is a railroad operation, within the meaning of the Pub. St. c. 112, section 212, as amended by the Statute of 1883, c. 243, providing that a 'corporation operating a railroad' shall be liable for negligence resulting in the death of an employee."

In *PEASLEE v. FITCHBURG R. R. Co.*, 152 Mass. 155 (September, 1890), tort, under the Public Statutes, c. 112, section 212, as amended by the Statute of 1883, c. 243, by the administrator of the estate of George L. Thompson, for causing the death of his intestate, on August 27, 1887, while the latter was in defendant's employ, verdict directed for defendant was sustained and plaintiff's exceptions overruled. "There was evidence tending to prove the following facts: Thompson was at the time of his death in the employment of the defendant corporation as a fireman on a locomotive engine. Between two and three o'clock in the morning of August 27, 1887, his engine, of which William E. Musgrave was the engineer, stood on a track in the freight yard of the defendant at Fitchburg, attached to a freight train which had just been made up and was about ready to start. The night was a dark one, and the freight train was unloaded. This freight train and its engine stood on the main track, so near its junction with a side track diverging from it that at the time an engine could not pass from the side track to

the main track without coming in contact with the freight engine. A switching engine, belonging to the defendant corporation, of which one Taylor was the engineer, employed by the defendant, had just been engaged in making up the freight train, and had then been backed up upon the freight train and there stood a short distance from the engine of the freight train. Thompson at the time was engaged in oiling the machinery of the freight engine, and stood beside the engine facing it, with his back to the side track. At that moment the conductor of the freight train, who stood a little to the rear of the switch engine, called out to Musgrave, "All right, go ahead, Bill." Taylor heard the words, "go ahead," but did not distinguish the name, and, without waiting for further information, supposing that the order was intended for himself, started the switching engine, although the switch at the junction of the two tracks was open and turned against him, and, the switching engine coming in contact with the freight engine, Thompson was crushed between them and killed." The Supreme Court held that the evidence did not show knowledge by defendant of the engineer's incompetency as alleged, nor was it sufficient to prove that defendant was negligent in employing said engineer. Held, also, that there was no evidence that the absence of proper rules caused the accident.

duly given the defendant written notice of the time, place, and cause of said injury. And the plaintiff further says, that he brings this action under the provisions of chapter 270 of the Acts of 1887, to recover compensation for the death of the said intestate, and not for his suffering."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action. The Superior Court (Suffolk) sustained the demurrer; and the plaintiff appealed to this court. *Judgment affirmed.*

C. G. FALL and G. D. BURRAGE, for plaintiff.

H. E. BOLLES and R. M. SALTONSTALL, for defendant.

Knowlton, J.—The plaintiff sues as administrator, and expressly states in his declaration that he brings this action "under the provisions of chapter 270 of the Acts of 1887, to recover compensation for the death of the said intestate, and not for his suffering." We are thus brought directly to the question, whether this statute, commonly called the Employers' Liability Act, gives an administrator a right of action on account of the death of his intestate, in addition to his right, as legal representative, to recover the damages which accrued to the intestate in his lifetime.

Clause 3 of § 1 of the statute provides that, where an employee is injured from either of the causes previously named, "the employee, or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies and against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." This plainly authorizes an executor or administrator to proceed in the right of his testator or intestate, and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantive cause of action. It gives only "the right of compensation and remedies," and it gives them to the employee, or to his legal representatives in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. But the law recognizes no "right of compensation" for the death of a person, and gives to a deceased person no remedies founded on his death. There are a few cases in which remedies are given by indictment, or to an executor or administrator for the benefit of relatives, where death has been caused by the fault of another, such as the negligence of a railroad

corporation or other common carrier of passengers, or the neglect of one whose duty it is to keep a way in repair. Pub. Sts. c. 112, § 212; St. 1883, c. 243; Pub. Sts. c. 73, § 6; c. 52, § 17. These remedies are not general, but are strictly limited by statute. Most of them are of a kind to which the statute which we are considering could not apply. Moreover, when they exist, they are given where death is instantaneous, or without conscious suffering, and also where it is not. *Commonwealth v. Metropolitan R. R.*, 107 Mass. 236. If this clause gave a right of action for the death of an employee as an extension to his representatives of a right which under one or two statutes belongs to the representatives of others who are not employees, it would necessarily include the right where death is instantaneous. But manifestly that was not intended. The next section of the statute (§ 2) deals expressly with such cases in a different way. It is quite apparent that clause 3 of § 1 gives the legal representatives of a deceased employee merely a right to recover the damages to which he was entitled at the time of his death. This is conceded by the plaintiff in his argument.

Section 2 relates to cases "where an employee is instantly killed, or dies without conscious suffering," and in such cases gives a right of action to his widow, or, if there is no widow and there are next of kin dependent on his wages for support, then to such next of kin. These two are the only sections of the statute which give to anybody a right to sue. Section 3 relates to the amount of compensation, and to the notice to be given as a condition precedent to the maintenance of a suit. The damages to be assessed under this section, in case of death, are those to be recovered by the widow or next of kin in a suit brought under § 2.

The expression, "compensation in lieu thereof," does not very aptly characterize the recovery authorized; for there is no mode of estimating "compensation" for the death of a man, and the amount to be recovered is required to be assessed with reference to the degree of culpability of the employer. So, too, the words in § 2 which state that the recovery by the widow or next of kin shall be "in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered," can hardly be used with literal accuracy, for there was no law under which a widow or next of kin could recover at all for

the death of the husband or relative until this statute was passed. The meaning obviously is, that the right of action given in the first part of the section shall not be affected by the fact that the deceased died instantaneously, or without conscious suffering. The words last quoted can not point to a standard for the measurement of damages. No such standard exists under the circumstances and conditions to which they profess to refer.

Section 1 of the statute is to be construed as giving a right of action to the employee, or, in case of his death, to his legal representatives suing in his right; § 2, as giving a right of action to the widow or next of kin, without indicating anything as to the mode of assessing damages; and § 3, as settling the amount to be recovered, first in cases under § 1, and secondly in cases under § 2.

Judgment affirmed.

NOTES OF MASSACHUSETTS CASES, UNDER THE EMPLOYERS' LIABILITY ACT (STATUTE OF 1887), ARISING OUT OF INJURIES SUSTAINED BY RAILROAD EMPLOYEES.

1. Brakemen.
2. Car cleaner.
3. Car inspector.
4. Conductor.
5. Switchmen.
6. Track inspector.
7. Track repairer.
8. Miscellaneous.
 - a. *Falling objects.*
 - b. *Hand-car accidents.*
 - c. *Injured on track, etc.*
 - d. *Employee of one railroad injured by another.*

Among the numerous Massachusetts cases, under the Employers' Liability Act, brought by Railroad Employees to recover damages for injuries sustained in the course of employment are the following:

1. Brakeman injured.

Uncoupling car — defective draw-bar.

In *DONAHOE v. OLD COLONY R. R. CO.*, 153 Mass. 356 (*February, 1891*), tort, under the Statute of 1887, c. 270, section 1, clause 3, to recover for personal injuries occasioned to a brakeman employed by defendant upon a freight train, through the

alleged negligence of the conductor in charge of the train, a broken draw-bar being the cause of the accident, and plaintiff being injured in attempting to uncouple a car from the engine, the engine being backed quickly and plaintiff's leg being crushed, verdict for plaintiff was sustained and defendant's exceptions were overruled. Opinion by C. ALLEN, J.

Obstruction near track.

In THOMPSON *v.* BOSTON & MAINE R. R., 153 Mass. 391 (*February, 1891*), judgment was rendered on the verdict for defendant, the syllabus to the official report stating the case as follows: "A brakeman, who had been employed for two years in shifting cars in a railroad freight yard, upon being ordered by the conductor, under whom he was working, to set two brakes upon a slowly moving freight train, jumped up between two platform cars and set the brake upon one car. Failing to set the other, and intending to set one elsewhere on the train, he put a hand on the sill of each car and proceeded to swing out the way the cars were going, without looking ahead or taking any other precaution to avoid obstructions near the track. When he had swung clear of the cars he, for the first time, saw a pile of rails beside the track and knew he was going to strike as he let go his hold, but it was then too late to help himself, and he struck them and was injured. *Held*, that he could not recover against the railroad company for his injuries, either at common law or under the Statute of 1887, c. 270."

Falling between cars.

In THYNG *v.* FITCHBURG R. R. CO., 156 Mass. 13 (*February, 1892*), tort, by the administratrix of the estate of Frederick Thyg, to recover for his death and suffering from injuries received while in defendant's employ as brakeman, plaintiff's exceptions to verdict directed for defendant were *overruled*, the negligence causing the injury being that of a fellow-servant. On the trial there was evidence tending to show that the intestate was the rear brakeman on a train of freight cars, which, at time of accident, was going from six to eight miles an hour; that the seventh car from the end broke apart from the car ahead of it; that neither of these cars belonged to defendant; that the intestate, who was on the front end of the seventh car, fell between the cars and was found badly injured under the forward truck of the seventh car, and subsequently died. Plaintiff sought to charge defendant under that clause of the statute (St. 1887, c. 270, section 1, clause 3), which relates to accidents that happen "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." It was held that such statute "seems

chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements."

Uncoupling flat car.

In *GRAHAM v. BOSTON & ALBANY R. R. CO.*, 156 Mass. 4 (*February, 1892*), tort, for personal injuries sustained by plaintiff, a freight brakeman in defendant's employ, defendant's exceptions on verdict returned for plaintiff were *sustained*, on the ground that the evidence did not sustain the allegation of negligence on the part of defendant's engineer. The injury occurred while plaintiff was uncoupling a flat car, with an oil tank on it, from a box car, his hand being caught while so doing. The declaration contained two counts, one at common law and the other under the Employers' Liability Act.

Contact with railroad bridge.

In *MAHER v. BOSTON & ALBANY R. R. CO.*, 158 Mass. 36 (*January, 1893*), tort, under the Statute of 1887, c. 270, defendant's exceptions to verdict for plaintiff were overruled. The material part of the declaration was as follows: "And the plaintiff says that she is the mother and next-of-kin of Peter W. Maher; that on or about February 4, 1891, the said Peter W. Maher, now deceased, was employed by the defendant corporation; that while he was so employed and in the exercise of due care, the defendant so negligently and carelessly ran a car, upon which he was required in the course of his employment to be, under a bridge, and so negligently and carelessly protected him in properly guarding the approach to said bridge, thereby not notifying him of his approaching the same, that he, the said deceased, was knocked off from the said car and killed." The plaintiff gave to the defendant the notice required by the statute of the time, place and cause of the injury within thirty days thereafter, and the same was put in evidence.

The Supreme Court (per BARKER, J.) said: "There is sufficient evidence to justify the inference that the deceased was in the exercise of due care. His duty required him to be on the rear car of the train. This was a tall refrigerator car attached to the rear end of the caboose. When he left the caboose he was told to get on top of this car with the flag, ready to flag the rear end; and one witness saw him getting on the car, holding to the brake-wheel. His duty required him to watch the rear of the train, and it may well be inferred that he rode on the top of the car, with his face to the rear. It was not negligent for him so to ride, although he knew there were low bridges under which the car must pass, because he had the right to suppose that the tell-tales would be in order and in their proper position, and that he would, by means of their action, receive sufficient warning to enable him to avoid

collision with bridges. There is a fair presumption that he, a man skilful and able in his business, who had just entered on the service of a new employer, and who, in the performance of an explicit order, had gone to attend to work which required him to look in the direction opposite that where the danger lay by which he was killed, was engaged in watching the rear of the car, and if so, he could not be blamed for not knowing he was about to come in contact with the bridge. In *Corcoran v. Boston & Albany R. R.*, 133 Mass. 507, it was impossible to say whether the deceased was knocked from the train by contact with overhanging ice, or fell upon the track from some other cause. In *Riley v. Connecticut River R. R.*, 135 Mass. 292, the position of the brakeman was at the head of the train, and his duty required him to keep watch in the direction of the bridge. So, in *Shea v. Boston & Maine R. R.*, 154 Mass. 31, the employment necessarily required him to look out for all engines and trains, as they might come at any time. In the present case the deceased was required to look out for a bridge only when warned by the tell-tales. In *Tyndale v. Old Colony R. R.*, 156 Mass. 503, it was the duty of the deceased, as track inspector, to keep his tricycle out of the way of passing trains; and there was no evidence to show what he was doing at the time of the accident or how it occurred. We regard this case as analogous to *Maguire v. Fitchburg R. R.*, 146 Mass. 379. The deceased was rightly in the place of danger, and was not wanting in diligence in suffering himself to come in contact with a bridge of which the tell-tale gave no warning." * * * [The cases cited appear with the Massachusetts cases in this volume of AM. NEG. CAS.]

Contact with awning at station.

In *FINK v. FITCHBURG R. R. CO.*, 158 Mass. 238 (*March, 1893*), freight brakeman injured by coming in contact with a wooden awning projecting from defendant's passenger station, it was held that, at common law, the risk of such an accident was one which plaintiff assumed. The Supreme Court (per ALLEN, J.) also said: "Nor is a remedy given to him by the Employers' Liability Act, Statute 1887, chapter 270, section 1, clause 1. The condition of the awning had not been changed for the worse during the time of the plaintiff's employment upon the road; and it was not the duty of the defendant to alter it, with a view of making it more safe. In order to afford a remedy under that clause of the statute there must have been a defect in the condition of the awning, which arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person in the defendant's service intrusted with the duty of seeing that the awning is in proper condition. Where there is no duty there can be no negligence. The duty of altering the awnings upon

its stations was not cast upon the defendant by the enactment of the statute. *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, and cases there cited." Plaintiff's exceptions overruled.

Flying switch — Caboose car derailed.

In *BROWNE v. NEW YORK & NEW ENGLAND R. R. CO.*, 158 Mass. 247 (*March, 1893*), tort by plaintiff, as the next-of-kin dependent, to recover for the death of her son, William D. Browne, under the Statute of 1887, chapter 270, verdict directed for defendant in the Norfolk Superior Court was sustained, ALLEN, J., stating the case as follows: "The accident occurred in this way: A flying switch was to be made. The switchman had been sent to throw the switch. The engine, with its head facing the cars, was backing and pulling the train along towards the switch. It had slackened its speed to enable Browne to pull out the pin and thus to uncouple the caboose car from the engine. He had hold of the chain attached to the pin, but he did not succeed in pulling it out, yet gave the signal for the engineer to start along. The engineer started faster; as soon as the engine got past the switch the switchman, without seeing that the caboose car was still coupled to it, threw the switch; the coupling held, the caboose car was pulled off the track and tipped over; some of the men jumped from it; whether Browne jumped or not is uncertain; at any rate, he was killed. The pin and the hole in the 'stiff shackle' through which it dropped were in good condition. The reason why Browne could not pull it out was that the engine was pulling the train, and he did not succeed in getting it out at the moment when the engine slackened its speed. The giving of the signal for the engineer to start faster before the pin was pulled out contributed directly to the accident. It implied that the car was uncoupled. Had this signal not been given, no accident would have occurred. The engineer would not have started up his engine, but would probably have stopped and pushed the cars back again and made a new attempt. After this signal everybody else had a right to assume that the car had been uncoupled. This seems to be the most probable explanation of the accident. At any rate, the plaintiff did not show that Browne's acts did not contribute to it. Exceptions overruled."

Train breaking apart — Brakeman found dead on track.

In *GEYETTE, ADM'X, v. FITCHBURG R. R. CO.*, 162 Mass. 549 (*January, 1895*), tort, under the Employers' Liability Act, direction of verdict for defendant was sustained, the syllabus to the official report stating the case as follows: "When a railroad freight train, consisting of two engines, twenty-two cars and a caboose, reached a certain station in the night time, a brakeman, whose position was on the forward part of the train, was sent forward by

the conductor with orders for the engineers. As the train went on towards the next station it broke apart, leaving a portion of the cars attached to the engines, and the other cars and the caboose separated therefrom. After the train had passed this station the brakeman, who was on the last engine looking out, said that he could not see the red light on the rear of the train, and then started back, with his lantern, along the top of the moving train to see if it had broken apart. The night was very dark and foggy. He was not seen alive after that, but his dead body was found in the center of the track, between the rails; and there were indications that he struck his feet on the tracks and was run over by that part of the train which was detached from the engines. *Held*, in an action against the railroad corporation for causing his death, that there was no evidence of due care on his part, and that the action could not be maintained." Opinion by KNOWLTON, J.

Striking against gate post at side of track.

In *AUSTIN v. BOSTON & MAINE R. R.*, 164 Mass. 282 (September, 1895), brakeman injured by striking against a gate post maintained by defendant at the side of its track, judgment was rendered on the verdict directed for defendant in the Suffolk Superior Court, it being held that plaintiff assumed the risk. The declaration contained counts at common law and under the Employers' Liability Act. MORTON, J., said: "We do not see how this case can be distinguished from *Lovejoy v. Boston & L. R. R.*, 125 Mass. 79; *Thain v. Old Colony R. R.*, 161 Mass. 353, and *Goodes v. Boston & A. R. R.*, 162 Mass. 287. The plaintiff had been employed as a freight brakeman on the Rockport freight for two years or more, and had had occasion to go by this post nearly or quite every day. The post was only one of many structures as near to the track as it was, and the plaintiff must be held to have taken the risk of injury from its proximity, whether he actually knew of the danger or not. The slight sagging of the post towards the track, of which there was evidence, is not shown to have had anything to do with the injury to the plaintiff. Judgment for the defendant." [The cases cited are reported with the Massachusetts cases in this volume of AM. NEG. CAS.]

Collision in freight yard — Brakeman killed.

In *CARON, ADM'X, v. BOSTON & ALBANY R. R. CO.*, 167 Mass. 72 (October, 1896), brakeman killed in defendant's freight yard, the action being brought under the Employers' Liability Act, plaintiff's exceptions on verdict returned for defendant were overruled. The syllabus to the official report states the decision as follows: "At the trial of an action against a railroad company for causing the death of the plaintiff's intestate in the defendant's freight yard by the alleged negligence of a person in

charge of the defendant's train, extracts from the regulations for the government of employees of the company, designed to regulate the responsibilities and conduct of engineers, conductors and brakemen in the management of trains out upon the road, and not in the freight yards, are inadmissible." Opinion by MORTON, J.

See, also, the former decision in the CARON case, where defendant's exceptions to verdict returned for plaintiff in the Hampden Superior Court were sustained. It appeared that plaintiff's intestate was engaged in making up a train in defendant's freight yard and was fatally injured by cars colliding with the train on which he was working. The Supreme Court discussed the case at length, MORTON, J., rendering the opinion, the points decided being, among others, assumption of risk, fellow-servant, Employers' Liability Act, etc. See CARON, ADM'X, v. BOSTON & ALBANY R. R. CO., 164 Mass. 523 (November, 1895).

Brakeman killed — Sudden start of train — Fellow-servant.

In DEWHIRST, ADM'X, v. BOSTON & MAINE R. R., 167 Mass. 402 (November, 1896), it was held (as per the syllabus to the official report) that: "An action cannot be maintained against a railroad corporation, under the Employers' Liability Act, Statute 1887, chapter 270, for causing the death of a brakeman in its employ, through the alleged negligence of the engineer of a freight train on which he was working, in stopping the train before he had received the motion so to do, if, assuming that the engineer had begun to stop the train before receiving such motion, the evidence fails to connect the accident with this conduct of the engineer, and leaves the cause of the accident conjectural." Verdict directed for defendant sustained and defendant's exceptions overruled. Opinion by MORTON, J.

Employee caught between trains — Negligence of a brakeman.

In STEFFE v. OLD COLONY R. R. CO., 156 Mass. 262 (May, 1892), employee caught between two moving trains and injured, negligence and incompetency of a brakeman being alleged, defendant's exceptions were overruled. It was held that the brakeman was in charge or control of the train at the time of the injury, within the meaning of the statute, "any person in the service of the employer, who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad."

2. Car cleaner injured.

In DEVINE v. BOSTON & ALBANY R. R. CO., 159 Mass. 348 (June, 1893), tort, under Statute 1887, chapter 270, for personal injuries sustained by plaintiff, while in defendant's employ as a car cleaner, by being thrown over a seat in consequence of the car in which she was working striking a bunting post with

unusual force, defendant's exceptions to verdict returned for plaintiff were overruled.

3. Car inspector injured.

In *MEARS v. BOSTON & MAINE R. R.*, 163 Mass. 150 (February, 1895), tort, under the Employers' Liability Act, Statute 1887, chapter 270, by the widow of John Mears, for causing his death, plaintiff's exceptions on verdict directed for defendant were *sustained*, the opinion being rendered by KNOWLTON, J., as follows: "The plaintiff's husband was killed while inspecting cars in the defendant's freight yard by being crushed by a car that was one of two box-cars thrown against the car on which he was working by another car kicked off from a train, and run on a descending grade, with no brakeman upon it, until it struck the two box-cars which were left standing on the track, with a space of about six or eight feet between them and the car at the end of which he was working. There was evidence tending to show that he was in the exercise of due care. He was in the performance of his duty, which required him to inspect the running gear, draw-bars, links and pins of cars left on the track where he found the car which he was inspecting. He had no notice that a car was to be kicked off and sent down the grade without a brakeman upon it, so as to strike the two cars which stood six or eight feet from that on which he was working. The two box-cars were so situated as to cut off from his view the car which was approaching. It was contrary to the rule of the road to kick off cars and send down a car in that way upon that track. It was a question of fact whether he used such care as was reasonable in the circumstances in which he was placed. *Davis v. N. Y., N. H. & H. R. R.*, 159 Mass. 532. There was also evidence that he died without conscious suffering. The testimony tended to show that his body was crushed, and a witness who was near him at the time of the accident testified that he was 'stone dead' when the witness reached him. What was said in regard to his taking steps did not necessarily imply any voluntary action or consciousness on his part. [This witness also testified that Mears took two or three steps after he was struck, and then fell] There was evidence tending to show that the conductor in charge of the train was negligent in violating a rule of the road in allowing the car to be kicked off and run down the track without a brakeman upon it, and without warning the plaintiff or seeing whether there were persons working under the cars who might be hurt. The jury might well find that his negligence in these matters was a direct cause of the accident. We are of opinion that, upon the whole case, there was evidence in favor of the plaintiff which should have been submitted to the jury. Exceptions *ustained*." (L. M. CHILD, for plaintiff; W. I. BADGER, for defendant.)

4. Conductor injured.

In *BOYLE v. NEW YORK & NEW ENGLAND R. R. CO.*, 151 Mass. 102 (*February, 1890*), plaintiff's exceptions were overruled, the case being stated by the Supreme Court (per HOLMES, J.) as follows: "This is an action for causing the death of the plaintiff's intestate. The case was tried by the judge below without a jury. He found the facts specially, and ruled that upon them the plaintiff was not entitled to maintain her action. If this ruling was correct, it is unnecessary to consider whether the rulings asked for the plaintiff were correct or not. The facts, briefly stated, were that the plaintiff's intestate was conductor of a switching crew in the defendant's yard, having charge of all movements of cars within or about the yard; and that while he was acting as such on May 18, 1886, between five and six o'clock in the afternoon and attempting to couple two cars in the usual course of business, his head was struck by a projecting piece of timber upon the moving car, and he was killed. The car was thirty feet long. The piece of timber was thirty-two feet and four inches long and projected thirteen inches beyond one end and fifteen inches beyond the other end of the car. The cars were loaded and handled in the usual way. The plaintiff's intestate was experienced in his business and knew the usages of the yard. The case is governed by *Lothrop v. Fitchburg R. R.*, 150 Mass. 423, decided since this case was argued. That case was like this, except in the particular that there the plaintiff had whatever advantage was to be gained from the Statute of 1887, chapter 270, so far as it modifies the common law as to the risks assumed by the servant, and the negligence of fellow-servants. *Mellor v. Merchants' M'fg Co.*, 150 Mass. 362. This accident happened before the date of this statute, and here there can be no doubt that the risk was assumed by the plaintiff's intestate, so that even if his conduct was not negligent in the sense of culpable, still, as it involved danger manifest to him, he could not complain of the consequences, or argue, as it might be argued, perhaps, in some cases, under the Act of 1887, that, if he acted under the fear of losing his place, he did not act at his own peril, unless a jury found him to have been culpably careless. Furthermore, if there was any negligence other than his own, which we are far from intimating, it was that of his fellow-servants. See *Hodgkins v. Eastern R. R.*, 119 Mass. 419; *Yeaton v. Boston & Lowell R. R.*, 135 Mass. 418; *Clifford v. Old Colony R. R.*, 141 Mass. 564. Exceptions overruled." (S. B. ALLEN and C. F. DONNELLY, also C. F. PAIGE, appeared for plaintiff; H. E. BOLLES and R. M. SALTONSTALL, for defendant.)

The *Lothrop* case referred to in the preceding case reported is as follows:

In *LOTHROP v. FITCHBURG R. R. CO.*, 150 Mass. 423

(January, 1890), plaintiff's exceptions to verdict directed for defendant were overruled, the syllabus to the official report stating the case as follows: "A freight brakeman upon a railroad, being ordered generally by the conductor of a train to do the coupling as it was being made up about noon on a clear day, attempted to couple from the north side of the track two flat-cars loaded with sticks of timber, which, on that side, dangerously projected towards each other beyond the ends of the cars, and, his head being caught between the ends of two of the timbers as the cars came together, he was instantly killed. He might have coupled them in safety, either from the south side of the track where the timbers did not project, or by stooping down below the projecting timbers. *Held*, in an action against the railroad company, under the Statute of 1887, chapter 270, section 2, for causing his death, that he was not in the exercise of due care within the meaning of section 1, and that the action could not be maintained."

5. Switchmen injured.

In *SULLIVAN v. OLD COLONY R. R. CO.*, 153 Mass. 118 (January, 1891), tort, under the Statute of 1887, chapter 270, section 2, by the widow of Edward M. Sullivan, a switchman in defendant's employ, for causing his death, verdict directed for defendant was sustained and judgment rendered thereon. The opinion by *FIELDS, C. J.*, is as follows: "We think that the evidence not only fails to show the exercise of due care on the part of Edward M. Sullivan, but tends to show that he was careless. He attempted to cross the track in the daytime, when a locomotive engine, as he knew, was expected soon to pass by, and could be seen approaching for a considerable distance if he had looked to see it, and there was no evidence that he looked to see it; but there was evidence that his back was turned towards the engine 'till just as the engine struck him.' It does not clearly appear that his duty required him to cross the tracks toward the west and then to cross back again; but, if we assume this, still there is not sufficient evidence of due care on his part. Judgment on the verdict."

In *SHEA v. BOSTON & MAINE R. R.*, 154 Mass. 31 (May, 1891), switchman going along track to attend to switch struck and killed by a backing engine, nonsuit was sustained, the syllabus to the official report stating: "If, in an action brought under the Statute of 1887, chapter 270, section 2, for causing the death of an employee, the evidence introduced is as consistent with carelessness on his part as with his exercise of due care, the plaintiff does not sustain the burden of proof, under section 1, that the deceased was in the exercise of due care and diligence at the time he was killed, and the action cannot be maintained." Opinion by *C. ALLEN, J.*

6. Track inspector injured.

In *TYNDALE v. OLD COLONY R. R. CO., and DOLAN AND ANOTHER v. OLD COLONY R. R. CO.*, 156 Mass. 503 (*June, 1892*), two actions of tort, both under the Statute of 1887, chapter 270, the first by the administrator of the estate of Michael Dolan, to recover for the conscious suffering of the intestate, in consequence of being struck by one of defendant's locomotives, caused by alleged negligence of defendant's agents in charge thereof, and the second action by the next-of-kin on the theory that Dolan was struck and instantly killed, or, if not killed at once, that he died without conscious suffering, verdict directed for defendant in each case was sustained, and plaintiff's exceptions overruled. The Supreme Court (per LATHROP, J.) held that the evidence failed to show due care on the part of the deceased. The intestate was a track inspector, and while running over the track on a three-wheeled car, called a tricycle, was fatally injured by a train striking the tricycle.

7. Track repairer injured.

In *SULLIVAN, ADM'R, v. FITCHBURG R. R. CO.*, 161 Mass. 125 (*March, 1894*), tort, under Statute 1887, chapter 270, by the administrator of the estate of William Sullivan, for personal injuries sustained by the intestate, a track repairer in defendant's employ, who, while, with other employees, pushing a car, was fatally injured by a "wild engine" colliding with the car on a curve, exceptions by plaintiff on verdict directed for defendant were overruled. The opinion rendered by HOLMES, J., is as follows: "The bill of exceptions states that it appeared in evidence that it was a part of the duty of trackmen to look out for wild trains, and that they had no other means of protection, except to take care of themselves. We do not regard this statement as qualified by the defendant's rule that "wild trains" must run cautiously around curves and over grade crossings, looking out for trackmen, "but accept the interpretation put upon the rule by the defendant's counsel that the caution has reference to the safety of the train, not of the trackmen. In this case the other persons on the hand-car escaped, and why the deceased failed to do so does not appear. In the opinion of a majority of the court, we cannot say that he was subjected to any danger beyond that of which he took the risk. *Shepard v. B. & M. R. R.*, 158 Mass. 174; *Lynch v. B. & A. R. R.*, 159 Mass. 536. Exceptions overruled."

In *DAVIS v. NEW YORK, NEW HAVEN & HARTFORD R. R. CO.*, 159 Mass. 532 (*October, 1893*), defendant's exceptions to verdict for plaintiff were overruled. The Supreme Court (per HOLMES, J.) said: "The plaintiff was run down by a train while he was repairing a track for the defendant, doing work which

required him to bend over. He was facing north, and the trains came from the south, so that, as he contended, he had to rely on others to warn him of their approach. It was the duty of the foreman of his gang, or section boss, as he was called, to warn him. The plaintiff went to trial on two counts under the Employers' Liability Act, Statute 1887, chapter 270, the second count alleging that the foreman, being a person intrusted with and exercising superintendence, etc., negligently failed to give warning, and the first count that the engineer of the train negligently failed to give any warning." * * * The learned justice reviewed the most argued point, as to whether there was neglect on the part of the foreman in giving the plaintiff warning, at length, citing several cases.

In *LYNCH, ADM'X, v. BOSTON & ALBANY R. R. CO.*, 159 Mass. 536 (*October, 1893*), tort, by the administratrix of the estate of Patrick Lynch, who, while in the defendant's employ and engaged in cleaning under a switch-bar in the defendant's yard at West Springfield, was struck by a shunted car and fatally injured, the Supreme Court rendered judgment for defendant on the verdict directed for the defendant in the trial court. HOLMES, J., said: "This case bears some resemblance to *Davis v. N. Y., N. H. & H. R. R. Co.*, 159 Mass 532 [the case reported in the preceding paragraph in this volume of AM. NEG. CAS.] The plaintiff's intestate was killed while engaged in a stooping position, in cleaning under a switch-bar in the defendant's yard, the work being of a kind which naturally withdrew from approaching trains. The difference is that in this case there is no sufficient evidence that the defendant had given the deceased the right to rely upon being warned when a train or car approached in such a way as to excuse him from using his eyes. The strongest testimony bearing upon the matter is that of the section foreman. He says that he generally looked out for the men the best way he could and warned them, but that even if the men were together, they had to look out for themselves, and, of course, that they had to look out for themselves when they were in different parts of the yard. At the time of the accident the men were separated, and the deceased must be taken to have known that he was not relieved from the necessity of keeping watch for himself. If so, he was not free from negligence in failing to do so. The case is distinguished in like manner from *Maher v. Boston & A. R. R.*, 158 Mass. 36, 15 Am. Neg. Cas. 459, *ante*, where the deceased had a right to rely on being warned by a tell-tale of the approach to a bridge, and from *Maguire v. Fitchburg R. R.*, 146 Mass. 379, 382 (15 Am. Neg. Cas. 495), where there was an implied assurance that the use of the track was suspended. See, also, *Lake Shore & M. S. R'y v. Lavalley*, 36 Ohio St. 221; *Vose v. Lanc. & York. R'y*, 2 H. & N. 728." * * *

8. Miscellaneous cases.**a. Falling objects.**

In *FITZGERALD v. BOSTON & ALBANY R. R. CO.*, 156 Mass., 293 (*May, 1892*), employee injured by the fall of a bale of hay, plaintiff's exceptions on verdict directed for defendant were *overruled*, *MORTON, J.*, stating the case as follows:

"The first count in the plaintiff's declaration is at common law, and is somewhat imperfectly drawn, but has not been demurred to. The only negligence alleged in it is that the bales of hay were piled carelessly by the defendant's servants, and by reason thereof fell on the plaintiff. The plaintiff and those who piled the hay were fellow-servants, and the defendant is not liable to the plaintiff for an injury resulting from the careless manner in which they did their share of the work in which all were engaged. *Hodgkins v. Eastern R. R.*, 119 Mass. 419; *Connors v. Holden*, 152 Mass. 598.

"The second and remaining count is under the Employers' Liability Act, so-called (*St. 1887, c. 270*). The gist of the count is that the plaintiff was employed under the direction of the defendant's superintendent, that the superintendent set him to work in a dangerous place, which he knew or ought to have known was dangerous, and that the superintendent piled the hay in a careless manner. There is no evidence that the superintendent piled the hay, or had anything to do with piling it, or that he set the plaintiff to work where he was working at the time of his injury. The only direction which he gave him was, that about a week before the accident he told him to go to the hay shed and work there and stow away hay. The superintendent had nothing to do with the particular place in the shed where the plaintiff was working. The shed itself was safe. The place where the plaintiff happened to be at work was only made dangerous by the proximity of the hay which fell. Neither was there any evidence that the superintendent knew or ought to have known that the hay was liable to fall. It did not appear how long it had been liable to fall, or what was the cause of its fall. There was uncontradicted testimony that the hay was piled properly. When the negligence of a superintendent is relied on, 'the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it.' *Roberts & Wallace, Employers' Liability* (3rd ed.) 265, 266. There was nothing in the case from which it fairly could be inferred that the hay fell because of negligence on the part of a superintendent. Exceptions overruled."

In *DOWD v. BOSTON & ALBANY R. R. CO.*, 162 Mass. 185 (*October, 1894*), tort, under the Employers' Liability Act, Statute 1887, c. 270, for personal injuries sustained by plaintiff while in defendant's employ, plaintiff's exceptions on direction of verdict for defendant were overruled. Opinion by *KNOWLTON, J.* At the

trial in the Superior Court, Hampden, it appeared that plaintiff was injured by being struck by a cement pipe, which was rolled off the top of a roundhouse, the roof of which was being repaired by the defendant's workmen, while the plaintiff was ascending a ladder leading to a staging at one side of the roundhouse on which he was employed. The question of superintendence was passed upon.

In *CASSADY v. BOSTON & ALBANY R. R. CO.*, 164 Mass. 168 (*June, 1895*), verdict directed for defendant was sustained, the syllabus to the official report stating the case as follows: "An employee cannot maintain an action against a railroad company for injuries occasioned while he was at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car and there fastened by a hook by the plaintiff and a fellow-servant a short time before, if the defect in the door, if any, which caused it to fall, was an obvious one, of which the plaintiff took the risk; and on the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law or under the Employers' Liability Act, Statute 1887, c. 270." Opinion by LATHROP, J.

b. Hand-car accidents.

In *SHEPARD v. BOSTON & MAINE R. R.*, 158 Mass. 174 (*March, 1893*), railroad employee riding on hand-car injured in collision with a "wild train," plaintiff's exceptions on verdict directed for defendant in the Worcester Superior Court were overruled. The facts are stated in the opinion by HOLMES, J., as follows:

"This is an action of tort for personal injuries, brought under the Employers' Liability Act, Statute 1887, c. 270, section 1, clause 2, alleging that the injuries were caused by reason of the negligence of a person in the service of the defendant intrusted with and exercising superintendence. At the trial, the judge directed a verdict for the defendant, and the plaintiff excepted. The case was this: The plaintiff was on a hand-car, and was run into by a wild train, as it is called, that is, a train running by special orders and not regularly to be expected at that time. The train and the hand-car were moving towards each other round a curved ledge of rock, and the ledge prevented their seeing each other until within a short distance, say from ninety to fifty feet. The train was on an up-grade, going ten or twelve miles an hour, the hand-car on a down grade, going from twelve to fifteen miles an hour, probably faster than the train. It was a common thing for wild trains to come along, and the plaintiff, who had worked on this road as a section hand for the greater part of the last fifteen years, 'knew about the habits of running the road.' The rules of the defendant provide that 'enginemen and conductors who are to run wild trains or

engines will see that the train preceding them carries a red signal for them,' and that this is a notice to section men that a wild train is to follow. The rule goes on: 'If, however, for any reason, it is impossible for them to do so, they must * * * run at a slow rate of speed around all curves.' Another rule is: 'Wild trains will, when a flag has not been sent on a previous train, before turning any curve, reduce rate to a speed not exceeding fifteen miles per hour.' In the present case it was impossible for the wild train to get the red flag on the train next ahead, because the latter had started. As has been said, it obeyed the rules as to speed. Another rule provided that: 'Wild trains may be run over the road on telegraphic orders without notice.'

"There was no direct evidence that the plaintiff knew the rules, but perhaps it might be presumed. The section foreman in charge of the hand-car had a copy of them. They are material only as admissions of what precautions were proper, and so far as they may have led those to whom they were communicated to expect conduct in accordance with them.

"Stopping at this point it is plain that the defendant had a right to send trains over its tracks at whatever times it saw fit, and the rules on their face gave notice that it intended to exercise its right. The rules also gave notice on their face that, while the signal ordered would be a warning when it was seen, in some cases no such warning could be given, and therefore that all persons interested must look out for themselves. The moment a man has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is traveling on the track the other way, it is impossible for him to escape the imputation of negligence merely by showing that such trains were few and the chance of their coming small. Furthermore, the plaintiff implies that they knew the train was coming by his testimony that they did not know when it was coming. On the other hand, despatching a wild train without signal is not necessarily negligence in the defendant." * * *

After reviewing other evidence the court said: "As we look at the plaintiff's case, the hand-car, without excuse and having notice that a wild train might come along at any time, went down grade round a curve of rock which wholly cut off the view, at a rate faster than that of the train which met it." * * * "A majority of the court also are of opinion that the defendant cannot be held liable on the ground that the conduct of the hand-car was governed by Doyle, the section foreman, that he was a person intrusted with and exercising superintendence, and that the accident was due to his negligence while superintending. Exceptions overruled."

In CLARE, ADM'R, *v.* NEW YORK & NEW ENGLAND R. R. CO., 167 Mass. 39 (October, 1896), verdict directed for

defendant, in action under the Employers' Liability Act, was sustained, the syllabus to the official report stating the case as follows: "An action for personal injuries alleged to have been caused to the employee of a railroad company by a defect in the machinery of a hand-car, from which he was thrown while he was turning one of the cranks thereof, cannot be maintained, if the cause of the injury is wholly conjectural."

c. Railroad employees injured on track.

In *GLEASON v. NEW YORK & NEW ENGLAND R. R. CO.*, 159 Mass. 68 (*May, 1893*), tort, for personal injuries sustained by plaintiff while in defendant's employ, he having his foot caught in a hole in the planking or timbering erected over Fort Point Channel in defendant's passenger yard, and being struck by a locomotive engine, defendant's exceptions to verdict for plaintiff were sustained, plaintiff being familiar with the general condition of the premises, and no duty resting upon defendant to alter the timbering or planking. *Held*, that plaintiff assumed the risk. The declaration was in two counts, the first being under Statute of 1887, c. 270.

In *HOULIHAN v. CONNECTICUT RIVER R. R. CO.*, 164 Mass. 555 (*November, 1895*), tort, under the Statute 1887, c. 270, clauses 2 and 3, by plaintiff, as one of the next of kin of Michael Houlihan, for causing his death, defendant's exceptions to verdict returned for plaintiff were overruled. It was held (*per BARKER, J.*) that the case was not one in which the cause of the accident and the conduct of the deceased must be wholly left to conjecture. The evidence justified a finding that, while walking upon a trestle helping a fellow-workman push a hand-car, the deceased was thrown from the trestle by the breaking of a plank, a part of which was found next to his body upon the ground. The question of due care on the part of deceased was properly for the jury. The plaintiff was a daughter of the deceased, and he lived with her and turned over to her all his wages. *Held*, to support a finding that plaintiff was in fact dependent upon the earnings of the deceased, within the meaning of the statute.

In *CLOUTIER, ADM'X, v. GRAFTON & UPTON R. R. CO.*, 162 Mass. 471 (*January, 1895*), defendant's exceptions were *sustained*, the case being stated by HOLMES, J., as follows:

"This is an action under the Employers' Liability Act, Statute 1887, c. 270, to recover for the death of the plaintiff's intestate and husband, one Cloutier, who was run down and killed on the defendant's track by its engine. At the time of the accident Cloutier was standing on the main track with his back to the approaching engine, working at a coal car which was on the same track, and which was run into. The case comes before us on exceptions to the refusal of the judge to take the case from the jury and to give other rulings

asked for by the defendant, and also to the exclusion of certain evidence.

"As the exception to the exclusion of evidence must be sustained, it need not be considered how far this case can be distinguished from *Lynch v. Boston & Albany R. R.*, 159 Mass. 536, 15 Am. Neg. Cas. 468, *ante*, and the like. It is enough to say that the court are not prepared to deny that it is distinguishable, in view of the presence of the car upon the track, and the evidence that the switch had been set so as to send the engine on to a loop track, and that the head brakeman changed the switch with the knowledge of the engineer. The facts may have warranted Cloutier in assuming that an engine would not run where a collision would be the manifestly necessary result. See *Maguire v. Fitchburg R. R.*, 146 Mass. 379 (15 Am. Neg. Cas. 495). If so, the court are of opinion that the jury might find that the only negligence of Cloutier, if any, was in not having the switch watched, and that the running of the engine on the main track was also negligent, and nearer to the accident. *Pierce v. Cunard S. S. Co.*, 153 Mass. 87. It is not denied that, if the foregoing propositions are correct, this case is within Statute 1887, c. 270. See *Davis v. N. Y., N. H. & H. R. R.*, 159 Mass. 532, 534, 15 Am. Neg. Cas. 467, *ante*.

"The defendant put in the evidence of different witnesses that Cloutier had orders to remain at the switch until the train had gone on its way by the loop track, and that he had told the engineer that he would do so. This evidence was disputed. In corroboration of it, evidence was offered that until the accident Cloutier always had been there. It is objected that the questions put were leading; but we think it plain that the evidence was excluded on general grounds, and not for form. This being so, we are of opinion that the exclusion was wrong. The habit of Cloutier in such a matter tended to show, by admission, what his duty was; or, putting it at the lowest, the fact was a circumstance to be considered by the jury in determining what the engineer reasonably might expect, as bearing on the question of his negligence. See *Readman v. Conway*, 126 Mass. 374; *Davis v. N. Y., N. H. & H. R. R.*, 159 Mass. 532, 535, 15 Am. Neg. Cas. 467, *ante*. We cannot say that all evidence as to the duty of Cloutier to watch the switch was immaterial, notwithstanding its bearing on the question of his care, for we cannot say, as matter of law, that if the jury had found that there was such a duty they were bound to find that there was later negligence on the part of the defendant. They might have found so, but we cannot say that they might not have found that Cloutier had invited and led the train into a position where it was too late to stop when the danger was noticed. See *Tyler v. Old Colony R. R.*, 157 Mass. 336, 340, 12 Am. Neg. Cas. 78*n*.

"A witness for the defendant, having testified on direct examina-

tion to a conversation with Cloutier after the accident, on cross-examination concerning it testified to a similar conversation at a later date. The plaintiff was allowed to contradict the later conversation in rebuttal. The admission of this evidence was excepted to. This exception must be overruled. The evidence on cross-examination was closely connected with the testimony in chief; it was material, and the contradiction of it tended to discredit the witness. *Commonwealth v. Bean*, 111 Mass. 438; *Fries v. Brugler*, 7 Halst. 79; *Hogan v. Cregan*, 6 Rob. (N. Y.) 138, 150; *People v. Cox*, 21 Hun, 47, 52; *State v. Patterson*, 2 Ired. 346, 353; *Wharton, Evid.*, § 552. Exceptions sustained." (F. A. GASKILL, appeared for defendant; F. P. GOULDING, F. L. DEAN with him, for plaintiff.)"

The Massachusetts cases cited in the foregoing case reported herein will be found reported with the Massachusetts cases in this volume of AM. NEG. CAS.

d. Engineer of one railroad company injured by negligence of servants of another company.

In *ROBERTSON v. BOSTON & ALBANY R. R. CO.*, 160 Mass. 191 (*November, 1893*), tort, brought by a locomotive engineer employed by the Connecticut River Railroad Company, for personal injuries sustained by alleged negligence of defendant's servants, verdict directed for defendant was set aside and case ordered to stand for trial. LATHROP, J., in delivering the opinion said:

"There was evidence that the plaintiff was, with the locomotive engine in his charge, lawfully in the yard of the defendant; and that, by the negligence of the servants of the defendant in giving a wrong signal, his engine went off the tracks at an open switch. The plaintiff was not injured by this accident. Three attempts were then made to get the engine on the tracks again, by attaching an engine of the defendant to the plaintiff's engine, and letting on steam. The coupling of the two engines together was done by the servants of the defendant. In the first attempt the plaintiff endeavored to assist by pulling the throttle of his engine and letting on steam. His engine was damaged by going off the tracks, the cover on the cylinder head being cracked, and the cylinder rod bent. The plaintiff discovered this condition of things before the first attempt to get his engine on the tracks failed. After this, and before the second attempt was made, the plaintiff got off his engine to fix the cylinder rod, and was off when the second attempt was made, and had just got back to the engine when the third attempt was made. When the first attempt was made the engines were coupled together with a link; at the second attempt they were coupled by a rope which broke; and at the third attempt they

were coupled by a rope having a link on one and a hook on the other. The link was fastened in the mouth of the drawbar of the plaintiff's engine, and the hood, instead of being put into the mouth of the drawbar of the other engine, was placed on top of the drawbar, and was kept in place by the coupling pin. In the third attempt the pin broke, the rope flew back, and the hook struck the plaintiff on the head and injured him severely. There was also evidence that this mode of fastening the pin was an improper mode, and the jury might have found that the servants of the defendant were negligent. The defense rests upon other grounds." * * *

The defendant contended that by force of certain agreements between the two companies, it was plaintiff's duty to assist in clearing the wreck, and it was not liable for injuries sustained in so doing. The Supreme Court, however, did not sustain this contention, but said: "Where an employee of one railroad company is injured while on the premises of another railroad company, through the negligence of the employees of the latter, it has been held that it is enough for the plaintiff to show that he was lawfully there, and that he is not bound by the terms of the agreement between the two companies." Citing several cases.

The defendant also contended that plaintiff was either a fellow-servant or a volunteer, but this was not sustained. The question of due care on plaintiff's part was held to be for the jury to determine.

The declaration in the *ROBERTSON* case, *supra*, contained counts at common law and under the Statute of 1887, c. 270, but the argument was confined to the common-law counts and the others were not discussed.

ENGINEER INJURED BY CONTACT WITH SIGNAL-POST NEAR TRACK—ASSUMPTION OF RISK.—In *LOVEJOY v. BOSTON & LOWELL R. R. CORP.*, 125 Mass. 79 (*July, 1878*), tort for personal injuries sustained by plaintiff while in the employ of defendant as a locomotive engineer, judgment was rendered for defendant, the Supreme Court (per *ENDICOTT, J.*) stating the case as follows:

"The plaintiff was in the employment of the defendant as a locomotive engineer. The electric signal-posts, against one of which the plaintiff struck when leaning outside his locomotive and looking back, to take a signal from the conductor, were placed three feet and eight inches from the track, and were two feet and a half from the outside of a passing locomotive. They were conspicuous objects ten feet in height, with a signal-box on top, three feet in diameter, and the post in question was visible for nearly half a mile in either direction. The abutments of forty-six bridges, numerous buildings, entrances to stations and other structures on the line of

the defendant's road were the same distance from the track. These facts were known to the plaintiff, though he testified that he had not, previously to his alleged injury, noticed this particular post. The only negligence imputed to the defendant was in placing this post so near the track.

"As between the plaintiff and the defendant, it was immaterial whether it would have been more prudent to have placed the signal-posts, abutments of bridges and other structures, so numerous on the line of the defendant's road, more than three feet and eight inches from the track. If there was any danger to the plaintiff, while in the performance of his duty, from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, the proximity to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner, and, as was said in *Ladd v. New Bedford R. R.*, 119 Mass. 412 (15 Am. Neg. Cas. 491), 'is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom.' Judgment for the defendant." (G. A. TORREY, for plaintiff; J. H. GEORGE, of New Hampshire, for defendant.)

See, also, **THAIN v. OLD COLONY R. R. CO.**, 161 Mass. 353 (May, 1894), where the syllabus to the official report states the case as follows: "The plaintiff, a locomotive engineer, was injured while on duty by being carried against a wooden post standing four feet from the track and two feet from the tender beam where he was at the time. The post had been put up about a week before the accident as a temporary support to a bridge, and the plaintiff, who was an experienced engineer, had passed it daily, but did not know that it was there. *Held*, that the plaintiff took the risk of the injury, and that the defendant was not liable. *Held*, also, that a rule of the defendant forbidding the piling of obstructions within six feet of the track would, if proved, be immaterial." Judgment on the verdict for defendant. Opinion by HOLMES, J.

CAREY v. BOSTON AND MAINE RAILROAD.

Supreme Judicial Court, Massachusetts, March, 1893.

[Reported in 158 Mass. 228.]

DANGEROUS DEVICE ON HAND-CAR.—The mere fact that a certain device in use on a hand-car was more dangerous than other devices does not render the employer liable for injury to an employee by such device.

DANGER OF CLOTHING BEING CAUGHT IN SET SCREW DOES NOT CONSTITUTE DEFECT IN MACHINE.—The danger of a person's clothes coming in contact with a revolving crank while in motion is an obvious one, and it cannot be said that because the danger was somewhat increased by the device used, there was a defect in the machine.

EMPLOYEE THROWN FROM HAND-CAR—CLOTHING CAUGHT BY SET SCREW—ASSUMPTION OF RISK.—Where an employee while propelling a hand-car had his clothing caught by the pin or bolt to the handle of the crank attached to the car, and he was thrown from the car and injured, and it appeared that the bolt projected from the handle, which was as well known to the employee as to the employer, it was held that he assumed the risk.

TORT, for personal injuries occasioned to the plaintiff by being thrown from a hand-car on the defendant's road. The declaration alleged that "the plaintiff, while in the proper performance of said employment, was engaged, together with other fellow-servants of the defendant, in propelling a hand-car upon the tracks of the defendant in West Boylston in Worcester county, by means of a crank attached to and a part of said car; that while so engaged, and in the exercise of due and proper care, a pin or bolt which formed part of the handle of said crank and also other parts and attachments of said handle became detached from said handle for the reason that said pin or bolt and said other parts and attachments of said handle were insufficient and unfit for the uses to which they had been applied; that directly said pin or bolt and said other attachments and parts of said handle became detached as aforesaid, said pin or bolt became entangled in the clothing of the plaintiff and he was thrown violently out of and in front of said car, and said car passed over the body of the plaintiff; * * * that said pin or bolt and said other parts and attachments were old, insecure and unfit for the uses to which they had been put."

At the trial in the Superior Court, before MAYNARD, J., there was evidence tending to show that the plaintiff was a section-hand employed on a section of the defendant's road; that on or about September 30, 1889, he went in the morning from Oakdale, the northerly end of the section, a distance of three or four miles, and worked there on the road through the day; that at about six o'clock in the evening the plaintiff, the foreman, and the other section men started back on the same car, and the plaintiff turned one of the two cranks by which the car was propelled, one of the other section men turning the other; and that soon after starting the plaintiff's clothing was caught by the crank, and he was thrown out and received the injury complained of.

The plaintiff testified that he was fifty-four years old; that he had worked for the defendant several years, not constantly, but as a special section-hand; that he worked on the day in question till about six P. M., when he started back; that it was about dark, growing dark; that he felt obliged to take the crank as the others had taken seats; that he took the right-hand crank and another man the left-hand crank; that he buttoned his coat three or four buttons and began to turn the crank; that the grade was a down grade; that he was turning the crank in the usual manner and was going at ordinary speed; that a bolt at the end of the crank took hold of his coat and threw him over, and the car ran over him; that the bolt in the handle stuck out an inch or an inch and a half, and that he was pitched out like a gunshot, and that was all he remembered; that this car had been on the road four or five days; and that he turned the other crank coming down in the morning, but had never before turned the one that caught him.

One Shepard, called by the plaintiff, testified that he was one of the men in the gang at the time the plaintiff was hurt; that the grade was a down grade of about seventy-five feet in a mile; that it was a pretty good running car; that the bolt was a little too long; that it stuck out beyond the handle; that the part of the crank which was taken hold of consisted of a wooden piece through which passed an iron bolt on which the wooden piece turned as the crank revolved; that this iron bolt passed through the arm of the crank, and projected on the other side in all an inch and a half; that the part which projected had a thread cut on it, and a nut screwed down to the arm, the nut being half an inch thick, and the threaded screw

projecting an inch beyond the nut; and that after the accident he found a piece of the plaintiff's coat caught on to the projecting end of the bolt, and twisted around the handle.

Shepard, on being recalled, testified as follows: "Q. How was this handle different, if different at all, from other handles on other hand-cars? A. Some other hand-cars wouldn't have that nut on there at all. It would be welded up. Q. How about other hand-cars and this extension of the bolt? A. It would be put in the same way, only put in the handle. The bolt put in the same way and nut put on here [indicating the end of the handle]. Q. On the other end? A. Yes."

The defendant offered evidence of the condition of the handle of the car, contradicting the evidence of the plaintiff.

The defendant requested the judge to rule as follows:

"1. That there was no evidence to warrant a verdict for the plaintiff. 2. That whatever defect there was in the hand-car was obvious, and as apparent to the plaintiff as to the defendant. 3. That upon the pleadings and proof the verdict should be for the defendant. 4. That there was no evidence that the projecting bolt or screw described by Shepard was a defect, and that, so far as appeared, it was a method of construction which the defendant had a right to adopt, even if it was more dangerous than some other method would be."

The judge declined so to rule; the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. *Exceptions sustained.*

The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

F. P. GOULDING, for defendant.

E. J. McMAHON and W. A. GILE, for plaintiff.

Lathrop, J.—In the opinion of a majority of the court, the instructions requested by the defendant should have been given. The plaintiff had been in the employ of the defendant for several years as a section hand. The hand-car on which he was injured had been in use for several days. While there is evidence that some other hand-cars had the end of the bolt welded, and others had the nut at the end of the handle, there is no evidence that a handle made as this one was, with a threaded screw projecting beyond the end of the nut, was not a well-known device. The fact that it was more dangerous than other devices does not render the employer liable.

In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, the

plaintiff was injured by a set screw projecting from the collar of a shaft. On the question whether this was a defect for which the defendant was liable, it was said by Mr. Justice Devens, in delivering the opinion of the court: "It cannot be claimed that the machinery used by the defendant was out of repair, or defective and unsuitable for the purpose. There was evidence on the part of the plaintiff that a recessed collar was in common use, so made that the set screw was sunk into the collar flush with its face, upon which there was much less liability of being caught than on that used by the defendant. But the plaintiff offered no evidence that the collar and set screw as used by the defendant were not also in common use." See, also, *Lovejoy v. B. & L. R. R.*, 125 Mass. 79, 15 Am. Neg. Cas. 475, *ante*; *Coombs v. Fitchburg R. R.*, 156 Mass. 200.

The danger of bringing one's clothes in contact with a revolving crank while in motion is an obvious one; and it can not be said that, because this danger was somewhat increased by the device used, there was a defect in the machine. Whatever danger there was in the fact that the screw projected beyond the nut was as well known and as obvious a danger to the plaintiff as to the defendant. The plaintiff does not testify that he was ignorant of the fact; and he had ample opportunity of knowing all about it. He must, therefore, be held to have assumed and taken the risk of injury from that source. *Pingree v. Leyland*, 135 Mass. 398; *Williams v. Churchill*, 137 Mass. 243; *Moulton v. Gage*, 138 Mass. 390; *Leary v. B. & A. R. R.*, 139 Mass. 580; *Russell v. Tillotson*, 140 Mass. 201; *Taylor v. Carew M'fg Co.*, 140 Mass. 150; *Gilbert v. Guild*, 144 Mass. 601; *Wood v. Locke*, 147 Mass. 604; *Probert v. Phipps*, 149 Mass. 258; *Lothrop v. Fitchburg R. R.*, 150 Mass. 423; *Pratt v. Prouty*, 153 Mass. 333 (1).

There was also a variance between the allegations and the proof. The declaration alleges that the pin or bolt became detached from the handle, and then became entangled in the plaintiff's clothing, and that it became detached because it and other parts and attachments of the handle were insufficient and unfit for the use to which they had been applied. The only defect alleged in the declaration is a condition which caused the pin or bolt to become detached. This was not supported by the proof.

Exceptions sustained.

1. The Massachusetts cases cited in this volume the case at bar appear with the Massachusetts cases reported in this volume of AM. NEG. CAS.

FERREN v. OLD COLONY RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January, 1887.

[Reported in 143 Mass. 197.]

EMPLOYEE ENGAGED IN MOVING A CAR CAUGHT BY PROJECTING OBJECT AND CRUSHED BETWEEN CAR AND BUILDING—KNOWLEDGE OF DANGER—QUESTION FOR JURY.—Where an employee, engaged as a blacksmith in defendant's railroad shop, was ordered by the foreman of the shop to assist other employees in moving a car, and that while so employed he was caught by a stake iron, which projected from the side of the car, and was rolled between the car and the building, and it appeared that he had never before been called upon to move a car in the place where the accident occurred, it was held that the case was for the jury to determine whether the plaintiff knew or appreciated the risk of the work and exercised due care (1).

TORT for injuries sustained by plaintiff while in the employ of the defendant, by being crushed between a coal car and the wall of a brick building in close proximity to the track on which the car was moving.

At the trial in the Superior Court (Bristol), before Hammond, J., the plaintiff testified that, at the time of the accident, he had been in the employ of the defendant about seven years as a blacksmith; that there was no agreement made that he should do any work in the yard outside of the shop in which he worked; that on January 20, 1883, while he was at work

1. But see the following case where the court held that the injured employee was familiar with the danger and did not exercise due care, distinguishing the case from the *FERREN* case (the case at bar):

In *GALVIN, ADM'X, v. OLD COLONY R. R. Co.*, 162 Mass. 533 (January, 1895), tort, for personal injuries to plaintiff's intestate, a freight handler in defendant's employ, caused by being struck by a locomotive through the alleged negligence of the engineer, defendant's exceptions on verdict returned for plaintiff were *sustained*, the case being stated by LATHROP, J., as follows:

"Taking the most favorable view of the evidence in this case for the plaintiff, we are of opinion that she is not entitled to recover. Her intestate was injured while using a narrow passageway between a railroad track and a cotton platform, which was not designed to be used in this way, although it was sometimes so used. There was a safer way, though longer, provided. Galvin was told to go to the pier with O'Brien and get a barrel of oysters. Instead of following O'Brien, who took the safer way, he chose the shorter way, and then, without looking to see whether the locomotive engine was coming, proceeded

as a blacksmith, the foreman of the shop called out, "All hands out to move a car;" that he went out with the others in the shop; that the car was in front of the door, the forward end being about three feet past the left-hand side of the door; that, the weather being chilly, he went back to get his coat and returned as soon as he could; that, as he went out of the door, he should think the car had just begun to move, it was just moving; that he took hold of the side of the car, there being a man in front of him and one behind him, faced obliquely forward towards the car, and began pushing; that they got the car under good headway, when he saw the man in front of him drop down under the car; that he looked and saw the danger he was in; that he then started to go back, when he was caught by a stake-iron, which projected from the side of the car, and was rolled between the car and the building; and that he had never before been called upon to move a car in that place, and had never before passed between the track and the corner of the building.

On cross-examination, the witness testified that he had never refused to respond to calls to move cars, although he "entered protests;" that he was familiar with the premises, and had crossed the track whenever he had occasion to, and knew that cars were moved along there; and that he looked ahead when he started to push the car, and saw the wall of the building, the side of the car, and the space between the two through which he expected to go, and into the open space beyond.

along this way with his truck. He was familiar with the premises, having worked there a year or more. The place of the accident was a pier, where there were several tracks, and the locomotive engine was going up and down the tracks all day long, and the time of the accident was 'just the busy time.' The evidence shows that the intestate, being warned by the shout of a fellow-workman, turned round, and, seeing the engine close upon him, backed up to the platform, holding his truck in front of him, and was struck by the engine.

"There is no evidence in the case to show that it was customary for the

engineer to ring the bell or blow the whistle as a warning to the employees on the pier, and they therefore had no right to rely upon a warning being given. So far as the evidence goes, it shows that the men were accustomed to look out for themselves. The way used by Galvin was of the same width throughout its length. There was, therefore, no trap, and the case is thus distinguishable from *Ferren v. Old Colony R. R.*, 143 Mass. 197." * * *

The cases cited in the *FERREN* case will be found reported with the Massachusetts cases in this volume of *AM. NEG. CAS.*

Other witnesses testified in corroboration of the plaintiff's testimony; and it appeared that the man behind the plaintiff got caught by the coat, but got loose; that the distance between the door of the shop and the corner of the building was between twenty-two and twenty-three feet, and the distance between the building and the track at the door of the shop was forty and a quarter inches, and at the corner of the building thirty and three-quarters inches. There was also evidence that the distance from the corner of the building to the stake-iron on the car, when opposite the corner, was seven and a half inches.

It was not contended by the plaintiff that the tracks or buildings were in any way unsafe or dangerous except in their relation to each other and to other permanent objects of the yard, nor that the car was unsafe or dangerous except in its relation to the building, yard, and the track upon which it was moving.

The judge ruled that the plaintiff could not recover, and directed a verdict for the defendant; and reported the case for the determination of this court. *New trial ordered.*

CHARLES A. REED (J. H. DEAN, with him), for plaintiff.

J. M. MORTON (J. H. BENTON, JR., with him), for defendant.

C. Allen, J.—The evidence would warrant a jury in finding that the defendant did not provide for its servants a reasonably safe place in which to do its work, and that there was danger in moving a car by man power in the place where this car was, by reason of its proximity to the building, and of the gradually lessening distance between the track and the building.

But the more difficult question is, whether under the circumstances disclosed, and assuming all facts as favorably to the plaintiff as the evidence warrants, we can say, as matter of law, that the plaintiff, by voluntarily entering upon the work, should be held to take the risks. There is no doubt of the general rule, that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk; but where he is not aware of the danger, and such ignorance is consistent with due precaution, it is otherwise. In the present case, it appears that the plaintiff had a general knowledge of the position of the track and of the building with reference to each other, and that he also knew that cars were

sometimes moved along there. But there was evidence tending to show that it was not a part of the business for which he was employed to assist in moving cars in the yard, though he was liable to be called on, when necessity required, to render such assistance; and he testified that when so called on he never refused, though he entered protests. He also testified that he had never before been called on to help in moving a car in the place where the accident occurred, and that he had never before been through that particular space between the car and that corner of the building. Of course he could see that this space was narrow; but it would seem that neither he nor the others who were pushing on the same side of the car with himself understood that it was too narrow to allow them to pass through in safety. This was his mistake. Seeing the situation in a general way, he took hold among the others, and tried to pass through what proved to be too narrow a place for him. He did not rightly estimate the probability or extent of the peril to which he was exposing himself. Though he could see the position of the car and of the building, it might nevertheless be found by a jury that he did not appreciate, and in the exercise of due care was not bound to appreciate, the danger. If, under the circumstances stated, he was called on by his foreman to assist in this work, which was outside of the work which he was employed to do, and in a place where he had not before done such work, and if the peril was not obvious to him, and he failed to take notice that the space between the car and the building was too narrow for him to pass through with safety, and if his attention was so given to the work which he was doing that he did not discover the danger till it was too late to save himself, we cannot say, as matter of law, that he must be held to have assumed the risk. The case is close; but the evidence is sufficient to be submitted to the jury upon the question whether he was in the exercise of due care.

The material point of distinction between this case and many others is, that here it is open to the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that in the exercise of due care he was not, as matter of law, bound to know or appreciate the same. *Haley v. Case*, 142 Mass. 316; *Russell v. Tillotson*, 140 Mass. 201; *Taylor v. Carew M'fg Co.*, 140 Mass. 150;

Leary v. B. & A. R. R., 139 Mass. 580; Lawless v. Conn. River R. R., 136 Mass. 1, 15 Am. Neg. Cas. 436, *ante*.

For these reasons, in the opinion of a majority of the court, the entry must be: *New trial ordered*.

**NOTES OF MASSACHUSETTS CASES ARISING OUT OF INJURIES
SUSTAINED BY RAILROAD EMPLOYEES.**

1. Brakemen.
2. Car inspector.
3. Conductor.
4. Fireman.
5. Flying switch.
6. Switch accidents.
7. Section and trackmen.
8. Watchman.
9. Yardmaster.
10. Miscellaneous.

Among the numerous Massachusetts cases relating to injuries to railroad employees, not reported elsewhere in this volume of AM. NEG. CAS., are the following:

1. Brakeman injured.

Contact with railroad bridge.

In RILEY, ADM'X v. CONNECTICUT RIVER R. R. Co., 135 Mass. 292 (September, 1883), it was held that an action could not be maintained against a railroad corporation for personal injuries resulting in death sustained by a brakeman coming in contact with a railroad bridge while standing on a box-car in the course of his duty as the train was running at about fifteen miles an hour; and judgment was rendered on verdict directed for defendant in the Superior Court. The Supreme Court said: "This case cannot be distinguished from Corcoran v. Boston & Albany R. R., 133 Mass. 507. The evidence offered wholly fails to show that the intestate was using due care, or that his death was not instantaneous. It does not sustain the burden of proof which the law places upon the plaintiff."

In CORCORAN v. BOSTON & ALBANY R. R., 133 Mass. 507 (referred to in preceding paragraph), employee falling from car, the question whether death of injured party was preceded by conscious suffering was for the jury. Whether deceased fell or was knocked from car by contact with overhanging ice was impossible to say. Where the question of due care was left to conjecture, the Massachusetts ruling in such cases is direction of verdict for defendant. Failure of plaintiff to offer evidence of due care precludes recovery.

See, also, the following case on similar point as in Corcoran case, as to conjecture as to cause of accident:

In FELT, ADM'X v. BOSTON & MAINE R. R. 161 Mass. 311 (May, 1894), tort, by the administratrix of George A. Felt, head brakeman on a freight train of defendant, for injuries sustained by being run over, resulting in his death, verdict directed for defendant was sustained. Morton, J., saying: "The

evidence entirely fails to disclose how the accident happened, or what caused it. The plaintiff's intestate said, when asked how it happened, that he did not know. The cause and manner of the accident are wholly matters of conjecture. There is nothing in the evidence tending to show any defect in the ways, works or machinery of the defendant to which it might be inferred that the accident was due, nor any negligence on the part of the conductor or any one else in charge of or managing the train or engine. Exceptions overruled."

Contact with overhead bridge.

In *MURPHY, ADM'R v. BOSTON & ALBANY R. R. Co.*, 167 Mass. 64 (October, 1896), freight brakeman in defendant's employ while riding on top of car found lying on car fatally injured, alleged to be caused by being struck by an overhead bridge, it was held that an action could not be maintained where the cause and manner of death was mere conjecture. Verdict directed for defendant sustained.

Contact with bridge-guard or tell-tale.

In *WARDEN v. OLD COLONY R. R. Co.*, 137 Mass. 204 (May, 1884), it was held (as per syllabus to the official report) that: "A railroad corporation is liable to one of its employees for an injury occasioned to him by being struck by a bridge-guard, if the guard is out of its proper position, and this is caused by the wearing out of a rope attached to the guard, and the corporation has not made suitable provision to have notice of and to remedy, defects liable to be occasioned by its use." Judgment for plaintiff. Opinion by W. ALLEN, J., Plaintiff was a brakeman in defendant's freight yard, and while engaged in his duties, was pushed from the top of a freight car by a bridge-guard, called in the declaration a tell-tale.

Colliding with structure near track.

In *SCANLON v. BOSTON & ALBANY R. R. Co.*, 147 Mass. 484 (October, 1888), brakeman injured while climbing up ladder on side of freight car by colliding with a structure near track, new trial was granted to plaintiff, it appearing that it was plaintiff's first trip as a brakeman, that he was unfamiliar with the road, that he was not warned of the danger, etc., and it was held that risk was not such an obvious one that he could be said to have assumed the risk and that an action could be maintained. A verdict was directed by the trial court for defendant, but the Supreme Court granted a new trial.

Striking against obstruction near track.

In *BABCOCK v. OLD COLONY R. R. Co.*, 150 Mass. 467 (January, 1890), freight brakeman in freight yard of defendant while attempting, in course of duty, to get upon footboard of tender of switching engine while it was in motion, injured by striking against some railroad ties which had been piled up within seventeen or eighteen inches of the track, defendant's exceptions to verdict for plaintiff were overruled.

Projecting object on track.

In *SWEAT v. BOSTON & ALBANY R. R. Co.*, 156 Mass. 284 (May, 1892), brakeman running along by side of moving cars to get to some stationary cars before moving cars reached them, for purpose of coupling the two parts of the train together, stepping on end of a loose board of some wooden

boxing which protected appliances which operated switches and injured, defendant's exceptions were *overruled*, the question of due care being for jury, and there being sufficient evidence of defendant's negligence for submission to the jury.

Defective hand-hold on ladder of car.

In *KEITH v. NEW HAVEN & NORTHAMPTON CO.*, 140 Mass. 175 (October, 1885), brakeman while in the line of his duty descending from the top of a box car falling to the ground in consequence of the hand-hold at the top of the ladder giving way and his foot crushed by a wheel of the car, defendant's exceptions to verdict returned for plaintiff were *overruled*. The freight car from which the plaintiff fell was received from another corporation.

Fall of trestle work.

In *ELMER v. LOCKE*, 135 Mass. 575 (October, 1883), tort against the manager of the TROY & GREENFIELD RAILROAD AND HOOSAC TUNNEL, for personal injuries received by plaintiff, a brakeman, in the employ of defendant, defendant's exceptions to verdict for plaintiff in the Superior Court were *overruled*, the syllabus to the official report stating the case as follows: "A brakeman in the employ of a railroad corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle-work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestle-work, and partly by negligence of the fellow-servants of the plaintiff."

Defective track — Unblocked frog.

In *WOOD v. LOCKE*, 147 Mass. 604 (November, 1888), tort against the manager of the TROY AND GREENFIELD RAILROAD and the HOOSAC TUNNEL, for personal injuries occasioned to plaintiff, a railroad brakeman, by catching his foot in an unblocked frog, while engaged in coupling cars, it was held that the action could not be maintained, the plaintiff having assumed the risks of the employment. Plaintiff's exceptions to verdict directed for defendant were *overruled*.

Coupling and uncoupling cars.

In *COATES v. BOSTON & MAINE R. R.*, 153 Mass. 297 (February, 1891), verdict for plaintiff was sustained and defendant's exceptions *overruled*, the court (per HOLMES, J.) stating the facts as follows: "A train with coal cars in the middle and box cars behind them was to be broken up in the defendant's Lynn freight yard. As the train was about to start, the plaintiff, a brakeman, was ordered by the conductor, under whom he was working, to separate the box cars from the coal cars, and to ride upon one of the coal cars, probably for the purpose of pulling out the pin and separating the box cars behind. He started to get on the rear coal car from the side, put one hand on the top and tried to put his left foot on the jaw-strap, an iron bar running below and between the ends of the axles out of sight under the body of the car. The jaw-strap was not there, the plaintiff's foot went on to the rail, the train was just starting, and his foot was crushed. The jaw-strap was intended only to strengthen the car. But the coal cars are not provided with any means for getting upon them, and the usual way in which

the men got upon them was over the side, using the jaw-strap as the plaintiff attempted to do. The jury were warranted in finding that the plaintiff, although not directed to get upon this particular car, naturally would do so, and would be expected to do so in carrying out his orders, and in the way in which he did, and that he might have done so prudently if the jaw-strap had been there."

In *HANNAH v. CONNECTICUT RIVER R. R. Co.*, 154 Mass. 529 (October, 1891), brakeman in defendant's freight yard while attempting to uncouple cars, stepping into hole in road-bed and foot catching therein, and leg run over by cars, verdict for plaintiff was sustained and defendant's exceptions overruled. Opinion by MORTON, J.

In *DODGE v. BOSTON & ALBANY R. R. Co.*, 155 Mass. 448 (January, 1892). brakeman trying to couple cars, pushing a stationary car along a few feet, the car being without a brake head, injured while walking between the cars, verdict directed for defendant was sustained, it being held that if there was any negligence it was either that of plaintiff or of fellow-servants.

Defective cars — Inspection — Assumption of risk.

In *YEATON v. BOSTON & LOWELL R. R. CORPORATION*, 135 Mass. 418 (September, 1883), defendant's exceptions to verdict rendered for plaintiff for \$11,000 in the Superior Court were sustained. The case is stated in the syllabus to the official report as follows: "A., a person forty-five years of age, entered the employ of a railroad corporation as a brakeman, having previously had some experience in that kind of work. He was placed at work in a yard of the corporation upon a switching engine, which was used to change cars about the yard and to make up trains. He, with others, was in the habit of taking cars which had been damaged and putting them upon a certain track in the yard two or three times a week. After working a few weeks, he was injured by reason of a broken brake on a car. Whenever there had been damaged cars to be moved, during his employ, his attention had been called to the fact by the yard master, who usually told the men that the cars had been damaged, and that he wanted them put on a track indicated. They could usually tell a damaged car by its appearance. A. was sometimes accustomed to examine to see if cars were damaged; and he looked at the car in question, with others, on the day of the accident, but saw nothing out of order about it. Held, in an action by A. against the corporation, that the injury was caused by one of the risks assumed by him in his employment; and that the action could not be maintained."

Defective freight car.

In *MCINTYRE v. BOSTON & MAINE R. R.*, 163 Mass. 189 (March, 1895), tort, for injuries to plaintiff in New Hampshire, while in defendant's employ as brakeman, by the breaking of a stake inserted in defendant's freight car, plaintiff's exceptions on verdict directed for defendant were sustained. The Supreme Court (per BARKER, J.) said: "There was evidence from which the jury might find that the plaintiff, while in the discharge of duty and using due care, was injured by the breaking of a weak, knotty, wormeaten and rotten stake, which was unfit for the use to which it had been put, of holding a load of railroad ties upon a platform car; and from the description of the stake it would be competent for a jury to find that the putting of such a stake to such a use was an act of negligence. The use of the stake as a means of

facilitating the passage of a brakeman from car to car of the train made it the duty of the defendant to use due care to see that it was suitable for that purpose. *Coates v. Boston & Maine R. R.*, 153 Mass. 297." * * *

In *LARKIN v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 166 Mass. 110 (May, 1896), tort, for loss of hand of plaintiff, a brakeman in defendant's employ, improper construction of freight car being alleged, plaintiff's exceptions to verdict directed for defendant were overruled, LATHROP, J., saying: "The plaintiff in this case had the entire management and control of the car, and could do his work in his own way. There was no necessity to put his hand between the end of the [oil] tank and the timber which kept it in place, as this timber projected beyond that portion of the tank which rested upon the floor of the car. The injury was caused by his putting his hand in a place which would be dangerous if the car had too much momentum, by causing the car to stop too suddenly on coming in contact with stationary cars, and thus causing the tank to slide forward. Under these circumstances, we are of opinion that the plaintiff must be said to have taken the risk, or that he was not in the exercise of due care." * * *

Struck by train at switch.

In *COOMBS v. FITCHBURG R. R. Co.*, 156 Mass. 200 (May, 1892), defendant's exceptions on verdict returned for plaintiff were *sustained*, the syllabus to the official report stating the case as follows: "A railroad brakeman, knowing that to turn a switch was incident to his employment, knowing its location and the manner of operating it, and knowing also the manner of making a flying switch, undertook, while aware that the cars were approaching, to turn the switch, and before he could get out of the way, he was struck and injured: *Held*, that he could not maintain an action against the railroad company for the injuries."

Foreign cars.

In *MACKIN v. BOSTON & ALBANY R. R.*, 135 Mass. 201 (June, 1883), rear brakeman on freight train thrown from cars to track and seriously injured, defendant's exceptions to verdict rendered for plaintiff for \$7,000 were sustained. The syllabus to the official report states the ruling of the Supreme Court as follows: "If a railroad corporation is bound to use reasonable care in furnishing its employees with suitable cars, on which they are employed, this rule does not apply to a car received from another corporation, while in transit to its place of destination; but the only duty it owes to its employees in such a case is that of providing suitable and competent inspectors." "An inspector of a railroad car and a brakeman employed on the car are fellow-servants; and the latter can not maintain an action against their common employer for an injury resulting from a failure of the former to perform his duty."

In *WALSH v. NEW YORK & NEW ENGLAND R. R. Co.*, 160 Mass. 571 (March, 1894), tort for a personal injury sustained by plaintiff in Connecticut, being caused by a broken draw-bar on a foreign freight car which did not belong to defendant, it was held (as stated in the syllabus to the official report) that "if by the law of another State where a personal injury is suffered a recovery may be had there, an action may be maintained for the injury in this commonwealth, although the plaintiff could not have recovered therefor if the injury had happened here."

Brakeman in employ of one railroad injured on track of another company.

In *TURNER, EXECUTOR, v. BOSTON & MAINE RAILROAD AND ANOTHER*, 158 Mass. 261 (March, 1893), tort, against the Boston & Maine Railroad and the Fitchburg Railroad Company, for personal injuries occasioned to the plaintiff's testator, Frank H. Turner, while in the discharge of his duties as a brakeman in the employ of the Fitchburg Railroad Company, by having his foot caught in a frog in the tracks of the Boston & Maine Railroad, it appeared that at the trial in the Superior Court, Suffolk, the jury returned a verdict for the Fitchburg Railroad Company, and for the plaintiff as against the Boston & Maine Railroad, and the latter alleged exceptions. The Supreme Court (opinion by ALLEN, J.) overruled the exceptions. An employee of one railroad company engaged in making a proper delivery of cars in the regular course of railroad business upon the track of another railroad, cannot be considered as a bare licensee on the track of said last-mentioned railroad.

2. Car inspector injured.

In *WHITMORE, ADM'X, v. BOSTON & MAINE R. R. Co.*, 150 Mass. 477 (January, 1890), plaintiff's exceptions to verdict for defendant were overruled, the syllabus to the official report stating the case as follows: "Freight cars were made up into trains on a railroad wharf as they were loaded from vessels by being hauled or 'kicked' into position by a stationary engine. A car inspector, in the employ of the railroad company upon the wharf, and familiar with this method of moving the cars there, notified the conductor of a train to leave a space between a defective car and other cars of the train; and, while he was standing in that space making repairs upon the car, a newly loaded car was 'kicked' up against such other cars, pushing them upon him and instantly killing him. *Held*, that the accident resulted either from his own negligence or from that of a fellow-servant, and that the railroad company was not responsible."

3. Conductor injured.

In *WESTCOTT v. NEW YORK & NEW ENGLAND R. R. Co.*, 153 Mass. 460 (April, 1891), tort, for personal injuries sustained by plaintiff, a conductor in defendant's employ, caused by a collision of trains, plaintiff's exceptions to verdict directed for defendant in the Superior Court (Suffolk) were overruled, it being held that plaintiff assumed the risk. The point decided is stated in the syllabus to the official report as follows: "If the conductor of an east-bound train standing at a station on a single track railroad, acting under orders from his superior issued under a misapprehension and temporary forgetfulness of rules equally known to both, which gave the right of way to an overdue west-bound train, starts his train without a protest other than to say that he would not take the responsibility, and then goes about his duties thereon, he is not in the exercise of due care, such as will enable him to maintain an action against the railroad company for personal injuries resulting from a subsequent collision of the trains; and if, knowing that the service was dangerous, he undertook it through fear of losing his position if he disobeyed, he will be taken to have assumed the risk." Opinion by KNOWLTON, J.

4. Fireman injured.

In *LEARY v. BOSTON & ALBANY R. R. Co.*, 139 Mass. 580 (June, 1885), it appeared that plaintiff was working temporarily as a fireman on a locomotive

in defendant's freight yard and, in attempting to get off the locomotive, fell or was thrown under the wheel and was injured. The trial judge directed a verdict for defendant, which was sustained by the Supreme Court, it being held that plaintiff assumed the risks of the employment.

5. Flying switch.

In *CONTENT v. NEW YORK, NEW HAVEN & HARTFORD R. R. Co.*, 165 Mass. 267 (February, 1896), railroad employee, a member of a switching crew, while descending ladder of car to pull headpin of car to make flying switch to switch some cars into freight house, struck by a "Star Union" car, defendant's exceptions to verdict for plaintiff were sustained, the plaintiff being held to have assumed the risks. The opinion rendered by ALLEN, J., was as follows:

"There was no conflict in the evidence as to the material points. The position of the tracks was open and visible. The use and size of the Star Union cars were known to the plaintiff. The side tracks were used as storage tracks, and were generally filled with cars. At the place where the plaintiff was hurt, the side track was parallel with the track upon which he was riding, and had not begun to curve in towards the other track. If the car had been left upon the curve, nearer the point of junction, the case would be different; but its distance from the track upon which the plaintiff was riding was no less than it must necessarily be, if standing upon the side track at all. The defendant did not owe it as a duty to the plaintiff to change the position of its tracks, or to discontinue the use of the Star Union cars upon its railroad, or to make a change in its custom of storing these and other cars upon the side track; and, therefore, in a legal sense, the defendant was guilty of no breach of duty and no negligence towards him. If the plaintiff entered into the employment of the defendant, he must be held to have assumed the risk arising from these things. *Lovejoy v. Boston & Lowell R. R.*, 125 Mass. 79; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135; *Fisk v. Fitchburg R. R.*, 158 Mass. 238; *Gleason v. New York & New England R. R.*, 159 Mass. 68; *Kleinst v. Kunhardt*, 160 Mass. 230; *Goldthwait v. Haverhill & Groveland Street R'y*, 160 Mass. 554; *Thain v. Old Colony R. R.*, 161 Mass. 353; *Goodes v. Boston & Albany R. R.*, 162 Mass. 287; *Tuttle v. Detroit, Grand Haven & Milwaukee R'y Co.*, 122 U. S., 189. Exceptions sustained."

The Massachusetts cases cited in the foregoing case will be found reported with the Massachusetts cases in this volume of AM. NEG. CAS.

6. Switch accidents.

In *LADD v. NEW BEDFORD R. R. Co.*, 119 Mass. 412 (January, 1876), where a roadmaster in defendant's employ while riding on its cars was injured by the same being derailed owing to the breaking of a switch on the road, the negligence alleged being failure to provide proper switch and in not having proper appliances on the cars, verdict directed for defendant was sustained, and plaintiff's exceptions overruled, on the ground that the accident was one of the risks of service assumed by plaintiff.

In *WALKER, ADM'X, v. BOSTON & MAINE R. R. Co.*, and *MILLER, ADM'X, v. BOSTON & MAINE R. R. Co.*, 128 Mass. 8 (November, 1879), two actions of tort, each for personal injury, resulting in death of plaintiff's intestate, caused by a railroad wreck due to misplacement of a switch, Walker being the engineer and Miller the fireman, of defendant's engine, judgment was rendered on the verdict directed in each case for defendant, it being held that

the misplacement of the switch was the negligent act of a fellow-servant of the plaintiff's intestate.

7. Section and trackmen injured.

Employee boarding train struck by hand-car.

In *O'BRIEN v. BOSTON & ALBANY R. R. Co.*, 138 Mass. 387 (January, 1885), tort for personal injuries sustained by plaintiff by being struck by a hand-car on defendant's road near one of its stations, judgment was rendered on the verdict found for defendant. The syllabus to the official report states the case as follows: "The foreman of a gang of men employed by a railroad corporation in repairing its track ordered them to quit work at fifteen minutes before the usual hour, and take a train, which was to carry them to a certain station without payment of fare, according to a monthly custom, to receive their wages. One of the men, while running along the track in order to get on the train, was struck and injured by a hand-car operated by another gang of men in the employ of the corporation. Held, that he was in the service of the corporation at the time he was injured, and was a fellow-servant with those whose act caused the injury."

Collision between hand-car and engine.

In *CLIFFORD v. OLD COLONY R. R. Co.*, 141 Mass. 564 (May, 1886), plaintiff's exceptions were *overruled*, the case being stated in the syllabus to the official report as follows: "A section hand in the employ of a railroad corporation cannot maintain an action against the corporation for personal injuries, caused by a collision between a hand-car on which he was at work and an engine of a train run by servants of the corporation, if the accident was occasioned by the negligence of the section boss and of the engineer of the train." Opinion by MORTON, Ch. J.

Track repairer struck by object thrown from passing train.

In *WALTON v. NEW YORK CENTRAL SLEEPING CAR Co.*, 139 Mass. 556 (June, 1885), judgment was rendered on the verdict directed for defendant, the facts being as follows: The plaintiff was in the employ of the Boston and Albany Railroad Company, as a laborer and track repairer, and while walking on the track and in the exercise of due care, an express train passed rapidly by on an adjoining track, and a bundle was thrown from the passing train by the porter on a parlor car, and the same hit and injured plaintiff. The bundle contained the porter's soiled clothing and other personal property, and was thrown to another person for the porter's sole convenience. The opinion was rendered by W. ALLEN, J., who said: "The rulings and instructions of the court were correct. There was no evidence that Maxwell [the porter] was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant in which he was employed by it for other purposes. Judgment on the verdict."

8. Watchman injured.

In *GRIFFEN, ADM'R, v. BOSTON & ALBANY R. R. Co.*, 148 Mass. 143 (January, 1889), night watchman at one of defendant's passenger stations while crossing track struck by train and fatally injured, a portion of the train having become separated, and the part which struck plaintiff's intestate came along

rapidly and quietly, without warning and without lights, it was held that plaintiff was entitled to go to the jury, and case was ordered to stand for trial.

9. Yardmaster injured.

In *HORNE v. OLD COLONY R. R. Co.*, 161 Mass. 180 (March 1894), where plaintiff, a yardmaster in defendant's freight yard, was injured by a fall occasioned by catching his foot under unboxed wires strung at the side of defendant's railroad track, it was held that plaintiff voluntarily incurred an obvious risk and was not in the exercise of due care, and verdict directed for defendant was sustained. Opinion by BARKER, J.

10. Miscellaneous cases.

Superintendent of drawbridge injured — Defective plank.

In *LEWIS v. NEW YORK & NEW ENGLAND R. R. Co.*, 153 Mass. 73 (January, 1891), tort, for personal injuries sustained by plaintiff while in defendant's employment, judgment was rendered on the verdict directed for defendant in the Superior Court (Suffolk). It appeared (as per opinion by MORTON, J.) that "the plaintiff was superintendent of the defendant's drawbridge over Fort Point Channel in Boston. He had held that position between three and four years prior to the accident. Connected with and forming a part of the drawbridge was a pier which was planked over. While running quickly along this pier in the discharge of his duty, for the purpose of catching a line from a vessel that was going through the draw, the plaintiff broke through a rotten place in the planking, and was injured in one knee so as to be permanently disabled." * * * "The plaintiff contends that there was evidence which would have justified the jury in finding that the rotten and defective condition of the pier which caused the accident was due to the negligence of the defendant, and in this we think he is right. He also contends that there was evidence to go to the jury that he was himself in the exercise of due care, and continued in the defendant's service, relying upon assurances given by one of its general superintendents that the pier would be repaired. In this, however, we cannot agree with him." * * * The court reviewed the evidence, and rendered judgment on the verdict for defendant.

Fall of iron castings.

In *REED v. BOSTON & ALBANY R. R. Co.*, 164 Mass. 129 (June, 1895), verdict for defendant was sustained, the case being stated in the syllabus to the official report as follows: "An employee, who, while attempting with another to place a heavy iron casting on a truck, is injured by the jarring of the floor occasioned thereby, causing other castings to fall in the direction of the truck, cannot recover for the injuries from his employer, if he fails to prove that the castings were in a dangerous position, and that the employer knew it, or that they had remained in this position so long a time that the employer ought to have known it." Opinion by LATHROP, J.

Employee crushed between car and post.

In *MURRAY, ADM'R, v. FITCHBURG R. R. Co.*, 165 Mass. 448 (March, 1896), two actions of tort, by the administrator of Michael Murray, the first for personal injuries to plaintiff's intestate by being crushed between the end of a car and a bunting post, and the second under Pub. St. c. 112, § 212, for causing his death, plaintiff's exceptions to verdict directed for defendant

were *sustained*. The facts are stated in the opinion delivered by KNOWLTON, J., as follows:

"These cases present two questions: first, whether there was negligence on the part of the defendant's servants, and, secondly, whether there was evidence that the plaintiff's intestate was in the exercise of due care.

"A Wagner sleeping car and one or two common passenger cars were coupled together, standing on the defendant's easterly side track near the station in Boston, the rear car being three feet from a bunting post at the end of the track. The plaintiff's intestate in the performance of his duty, attempted to pass through between the end of the car and the bunting post carrying two pails of water to be put into the tank in the sleeping car. The switching engine backed down, pushing before it some cars, one of which was to be coupled to the standing cars to make up a train. The persons in charge of the switching engine knew, or should have known, that several persons were probably at work on and about the standing cars, cleaning them and preparing them for their trip. There was evidence that a part of the work to be done was oiling the trucks and cleaning the running gear. There was also evidence that the brakes were set upon the standing cars. The car which was to be coupled to them was pushed against them so forcibly as to move them about three feet, and to crush the plaintiff's intestate between the car and the bunting post. A witness standing on top of the Wagner car, waiting for the water which was to be put into the tank, was nearly thrown down by the suddenness of the movement under him. Another man working upon a ladder on the inside of the Wagner car was thrown to the floor. We think it was a question of fact for the jury, upon the evidence, whether the defendant's servants were not grossly negligent in pushing back the car so as to strike the standing cars with so much force.

"We are also of opinion that there was evidence that the plaintiff's intestate was in the exercise of due care. In the first place, he knew that the cars would not intentionally be moved back against the bunting post. They had been left as near the end of the track as it was intended to put them, and their brakes had been set to hold them firmly there. Nothing but an accident could throw them back against the bunting post. It was necessary for him to cross the track to get the water for the car. This was the most direct and convenient course by which to go for it. There was evidence that, by reason of a curve in the track, one standing at the bunting post could not see the switching engine or the car as they approached. While the jury might well find that his conduct in attempting to pass between the car and the bunting post was negligent, there were facts and circumstances proper for their consideration which tended to show that he was in the exercise of due care. Exceptions sustained."

VOLUNTEER STRUCK BY TRAIN—FELLOW-SERVANT RULE APPLIED.—In **BARSTOW, ADM'R, v. OLD COLONY R. R. CO.**, 143 Mass. 535 (*February, 1887*), where plaintiff's intestate had obtained permission from defendant's station agent to come to the station to learn telegraphy, having been warned not to walk on the tracks, and on the occasion of the accident volunteered to do an errand for the station agent, and walked along the

tracks although he knew a train was approaching and did not look to see what direction the train was taking nor pay any attention to the warning whistle, and was struck and killed by the train, which could have been avoided had he exercised proper care, it was held that an action could not be maintained against the company for the injury and judgment was rendered on verdict for defendant. The Supreme Court in discussing the rule as to liability in the case of injury to a volunteer, said: "But if the deceased undertook voluntarily to perform service for the corporation, and the agent assented to his performing such service, then he stood in the relation of a servant while engaged in such service. The rule of law, that a master is not, in general, responsible to his servant for injury sustained by the negligence of a fellow-servant in the course of their common employment, applies to such volunteer."

EMPLOYEE OF ELEVATOR COMPANY KILLED BY CARS OF RAILROAD COMPANY—QUESTION FOR JURY.—In **MAGUIRE, ADM'X, v. FITCHBURG R. R. CO.**, 146 Mass. 379 (*March, 1888*), tort, for causing the death of plaintiff's intestate in the elevator of the Hoosac Tunnel Dock & Elevator Company, verdict directed for defendant was set aside and new trial ordered, the case being for the jury. The deceased was not the servant of the defendant, but of the aforesaid Elevator Company. The Supreme Court (per DEVENS, J.) said: "As the evidence tended to show he was engaged in the elevator building in assisting to unload grain from two cars, which had been brought in by the defendant, the brakes of which had been set and the cars thus rendered stationary. The defendant negligently and without reasonable warning, while this operation was being performed, sent certain other cars into the building against the stationary cars with such violence as to force them a considerable distance from their position. Immediately afterwards the plaintiff's intestate was found dead, lying across one rail of the track. The track upon which the stationary cars thus being discharged stood was a single one, laid down between a platform (covering hoppers into which the grain was shoveled from the cars) and the brick wall on the other side of the building. The cars occupied the whole space between this platform and the wall, except about eight inches on either side. During the operation of unloading it was common for grain to fall from the cars outside the hoppers, and upon or near the track, and grain had so fallen at this time. It was the custom to sweep the grain which had thus fallen into the hoppers. It was a part of Maguire's duty, with that of the other men, to do this, and at other times he had been thus engaged." * * *

The court reviewed the evidence and discussed the question of due care on the part of the deceased, holding that it was for the jury

to determine the question from the facts. Continuing, the court said:

"The case is quite distinguishable from those cases where it has been held that the disclosure of the facts has been so limited that there could be no fair inference that a plaintiff was in the exercise of due care, or that the evidence was equally consistent with care or negligence on his part. If the only evidence of which deceased could have been guilty must have been that he was on the track with no rightful purpose, or under such circumstances that a prudent man would not have been there, and if the evidence and the inferences to be drawn from it tend to show affirmatively otherwise, the issue of due care may be sustained.

"Without further undertaking to examine in detail the numerous cases cited by the defendant, that upon which it principally relies is *Hinckley v. Cape Cod Railroad Co.*, 120 Mass. 257. But that case does not sustain the defendant's contention. It was one where evidence was necessary in order to show what was the conduct of the party injured in regard to circumstances especially requiring care on his part. Without this it could not be determined whether he was or was not in the exercise of due care, and no such evidence was offered. It was said not to differ substantially from a case where the party injured might have been found lying on the ground, having been knocked down by a passing car on the railroad track, there being no evidence as to what his own conduct had been. Hinckley, who attempted to cross a side railway track in order to reach the station on the other side, as he approached a place known as Murphy's Corner, on his way thus to cross, had a view of the railway track for one hundred and fifty feet, and as he reached the track it could have been seen by him for the distance of half a mile. One Basset, who was some fifteen or twenty feet behind him, stopped at Murphy's Corner, and saw the car which subsequently struck Hinckley detached from the train on the main line. He called to Hinckley, but was probably not heard on account of the wind. It did not appear that Hinckley, either at Murphy's Corner, at any intermediate point, or when near the track and about to cross, exercised the precaution of looking to see whether anything was approaching. In the utter absence of evidence as to what Hinckley did after the time when his conduct became a matter of importance, it was impossible to infer that he had exercised the care and circumspection properly to be demanded of him.

"The case at bar differs from that class of cases in which it is necessary to show some positive act on the part of the plaintiff in order to prove that he was in the exercise of due care. The plaintiff's intestate had a right to believe, if engaged in any labor connected immediately with unloading the cars, that he would not be interfered with by a reckless incursion of the trains of the defend-

ant. We are therefore of opinion that the inquiry whether the plaintiff's intestate was in the exercise of due care should have been submitted to the jury." New trial ordered.

The case of *HINCKLEY v. CAPE COD R. R.*, 120 Mass. 257, cited in the Maguire case, *supra*, was a crossing-accident case, the facts of which are sufficiently stated in the Maguire case.

PERSONS UNLOADING COAL CARS IN COAL YARD STRUCK BY ONE OF DEFENDANT'S CARS — RAILROAD NOT LIABLE.—In *DONAHOE v. NEW YORK & NEW ENGLAND R. R. CO.*, and *BECKER v. NEW YORK & NEW ENGLAND R. R. CO.*, 159 Mass. 125 (*May, 1893*), two actions of tort, tried together, for personal injuries sustained by the plaintiffs respectively, verdict being returned for defendant in each case, plaintiffs' exceptions were *overruled*. At the trial in the Superior Court, it appeared that the plaintiffs were in the employ of one Fisher, who was engaged in the coal business in Dedham; that plaintiffs, at the time of the accident, were standing on a platform parallel with a track built on a wooden trestle, at an elevation of eleven feet from the ground, which ran through the middle of Fisher's coal shed, and from which coal could be dumped from cars into bins on either side; that a train of cars loaded with coal had been transported by the defendant corporation to Fisher's coal yard, and placed by the defendant on the trestle track; that the body of these cars was hung on two iron rockers, so called, which rested upon solid iron bars, known as the "rocker beds," attached to the truck frame of the car at either end of the car; that the rockers were kept in position on the rocker beds by several iron pins projecting from the beds and fitting into corresponding cavities in the rockers; that the body of the car was kept in a horizontal position by two iron hooks on either side, which hung down from the bottom sill of the car and caught upon two iron latches which were made fast to the truck frame; that the hooks were attached to the body of the car by an iron casting so that they swung to and fro, and on the outside of and attached to the hooks was a solid piece of iron of considerable weight, the purpose of which was to keep the hooks down over the latch; that while the plaintiffs, with others, were engaged in unloading one of these cars, the body of the car, which had been tipped up so that a portion of its contents was discharged into the shed, suddenly turned and swung back, striking the plaintiffs, who were thrown from the platform to the ground, and received the injuries complained of. The defendant submitted evidence tending to disprove plaintiffs' case, by showing that the accident was probably not due to a defect in the car.

STREET RAILWAY EMPLOYEE INJURED BY HAY-CUTTING MACHINE—WARNING—WHEN EMPLOYER BOUND TO INSTRUCT EMPLOYEE.—In **STUART v. WEST END STREET RY CO.**, 163 Mass. 391 (*April, 1895*), tort, for personal injuries sustained by plaintiff, while in defendant's employ, by the loss of his left hand in a hay-cutting machine operated by horse power, defendant's exceptions on verdict returned for plaintiff were *sustained*, it being held that defendant was not negligent in failing to give plaintiff instructions as to operating the machine. The facts of the case are stated in the opinion by KNOWLTON, J., as follows:

"The evidence tends to show that the best device possible for the protection of persons working on the machine was attached to it in the form of a hood extending back two feet and a half from the knives. The evidence was uncontradicted that, since January 1891, when hoods were placed on the forty-three machines used in the forty-three barns owned by the defendant, no accident has happened in the use of the machines except the accident to the plaintiff. The operation of the machine was simple and obvious to every one of ordinary intelligence, the knives were open to view, and the plaintiff well understood that he would be seriously injured if he allowed his fingers to come in contact with them. They revolved rapidly, and when the hay was passing through them, it was drawn forward with a great deal of force. All this could be seen in a minute by every observer. No one who saw the machine in operation could fail to know that if it was clogged, and if the hay was then loosened with the hand and started forward, it would go with great force as soon as it was brought within the traction of the revolving knives. It was apparent to everybody that it would be very dangerous to permit one's fingers to be caught in a tuft of hay which was about to pass forward between the knives. We see no evidence of any kind of danger which was not open and obvious to every one who saw the machine in operation.

"The plaintiff at the time of the accident was twenty years and six months old, and was a 'young man of ordinary intelligence and mental quickness.' He testified that he had seen the machine work not more than three times before the day of the accident, and that on one previous occasion he had fed the hay into it for a few minutes. At that time he asked permission to feed it of the man who was working upon it. The duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge and which he has reason to believe his employee does not know, and will not discover in time to protect himself from injury. In the early cases the doctrine was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person of average

intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of ordinary faculties which every man should use when his safety is known to be involved. *Russell v. Tillotson*, 140 Mass. 201; *Ciriack v. Merchant's Woolen Co.*, 146 Mass. 182; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 267; *Carey v. Boston & Maine R. R.*, 158 Mass. 228, 231; *Connolly v. Eldredge*, 160 Mass. 566; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 160; *Wilson v. Steel Edge Stamping & Retinning Co.*, 163 Mass. 315." * * *

STREET RAILWAY EMPLOYEE CAUGHT BETWEEN RUNNING-BOARDS OF TWO OPEN CARS—KNOWLEDGE OF DANGER—ASSUMPTION OF RISK.—In **GOLDTHWAIT v. HAVERHILL & GROVELAND STREET R'Y CO.**, 160 Mass. 554 (*March, 1894*), the case is stated in the syllabus to the official report, as follows: "A person employed about its car-house by a street railway corporation, who is injured by having his leg caught between the running-boards of two open cars, while one is passing the other upon a curve in the tracks leading from the car-house to the street, must be deemed to have so known and appreciated the danger arising from the swing of a car in passing over a curve as being obviously incident to his employment as to preclude him from maintaining an action against the corporation for his injury; and it is immaterial that the risk was increased during his employment by the use of open cars, longer and wider than closed cars, if he continued to work without protest or promise of change of conditions." Judgment for defendant on the verdict.

CAYZER v. TAYLOR.

Supreme Judicial Court, Massachusetts, November Term, 1857.

[Reported in 10 Gray, 274.]

DEFECTIVE MACHINERY — EXPLOSION OF STEAM BOILER — EVIDENCE — STATUTE — LIABILITY OF MASTER FOR ACT OF INCOMPETENT SERVANT — FELLOW-SERVANT — DEGREE OF CARE.— In an action by a servant against his master for injuries, sustained from the explosion of a steam boiler used in his business, the plaintiff introduced evidence without objection that there was no such fusible safety plug on the boiler as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug; and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover; and refused to instruct them that if the defendant used all the appliances for safety, that were ordinarily used in such establishments as his, he was not liable in respect to this boiler, although he did not use the fusible plug. *Held*, that the defendant had no ground of exception.

Ordinary care must be measured by the character and risks and exposures of the business; and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases.

A master is responsible to his servant for injuries occasioned by the negligence of an incompetent fellow-servant, knowingly or negligently employed by the master.

A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow-servant contributes to the accident.

(Syllabus to official report.)

ACTION OF TORT for injuries sustained by scalding from the collapse of a flue in a steam boiler owned and used by the defendant in his manufactory while the plaintiff was in his employment. The causes of the accident, as alleged in the declaration, were that the defendant negligently managed his engine, and "did not provide a competent and suitable engineer and boiler, and engine and pump, and gauge and appendages, and machinery and precautions for safety used therewith, but carelessly and knowingly provided such as were not competent and suitable and sufficiently safe, and knowingly and carelessly continued the same in use, and improperly used them while out of order and unsafe, either solely or in connection with his servant."

Trial in the Superior Court of Suffolk at January Term,

1857, before Huntington, J., who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"Among the particulars which were alleged by the plaintiff against the sufficiency of the boiler, and to sustain which evidence was offered, was that it was unprovided with a certain fusible safety plug, referred to in the Statute of 1852, chapter 247, and that the defendant used the boiler knowing it to be so unprovided.

"The defendant, upon this point, offered evidence to show that it was not customary among persons having in use such boilers as the defendant's, and in such establishments as his, to use in connection with them such fusible plugs; and he prayed the court to instruct the jury that, if the defendant's boiler was supplied with all such appurtenances and appliances for safety as such establishments were ordinarily supplied with, he was not liable, in respect to his boiler, though, in fact, he did not have it supplied with the said fusible safety plug in the said statute mentioned. But the court rejected the evidence of a custom violating the requirements of the statute, and instructed the jury that, if the plaintiff had satisfied them that the defendant knowingly used his boiler without said plug, placed as the law directs, and that the want of it caused the accident, or essentially contributed to it, and that the injury would not have arisen had it been supplied, this might be used as evidence of negligence, and the plaintiff might have a verdict on this ground; and that it might be considered as part of the implied contract between the plaintiff and the defendant that the latter would comply with the law regulating the use of the boiler so as to give the former a remedy if he sustained injury from the non-compliance with its enactments, but that if he used the boiler without this knowledge, he could not be charged with negligence on this ground, for he had not violated the law.

"Evidence was also introduced on the part of the defendant tending to show that the accident would not have happened if the engineer had used ordinary care in the management of the boiler and its appurtenances; and to show that the defendant had in all respects used due care. And the defendant prayed the court to instruct the jury that, if they were satisfied that without negligence on the part of the engineer the accident would not have happened, the defendant was not liable.

"The court instructed the jury thus: The plaintiff must show that he himself was in the exercise of due or ordinary care at the time of the accident. This care must be adapted to the nature of the employment and to the hazards attending the business.

"If the plaintiff and engineer were in the same general employment or business, under one employer, it then becomes important to ascertain the legal relation of the parties. We have in the outset the general principle. A person entering into the service of another, in consideration of his compensation, takes upon himself the ordinary risk of the employment in which he engages, and this risk includes the negligent acts of his fellow-workmen in the course of the employment. But a fellow-workman's being negligent and unskilful on a particular occasion would not give a right of action. The implied contract between a master and servant is that the master or principal will use such care as a prudent and careful man in the same business, a business similar in its risks, character and extent, would use, both in the selection and employment of an engineer, and in the selection and use of engine, boiler, flues, pumps, pipes, cocks, gauges, valves and all appurtenances belonging thereto. If the defendant employed an unfit and improper person, or used an unfit engine, boiler, flues, gauges, valves and apparatus, or either of them, and such employment or use arose from want of ordinary care in the employer, and by reason of this want of care the injury was incurred, then the defendant would be responsible.

"The meaning of the language 'ordinary care' was then defined, as distinguished from extraordinary care, on the one hand, and negligence on the other. The care must be adapted to the nature of the business and employment. The jury will ascertain, from the evidence in the case, what at that time were the qualifications of an engineer in such an establishment as the defendant's was, and with such engine and apparatus. His qualifications are to be measured by the class of engine and the business done. The care used by the master in the selection of servants and machinery, engine and apparatus, is to be measured by the same standard. This standard would be higher in proportion as life or limb was endangered; and higher where a large amount of property was involved than a small amount. In other words, the care and prudence must

be graduated by the character and risks and exposure of the business.

"It is contended that the defendant was negligent in the selection of an incompetent engineer, and negligent in continuing him in his employment. There are two inquiries here: First. Was the engineer competent or incompetent? Second. If he was not, had the master reason to know it? If he had reason, and if he knowingly, or having good reason to know, and without due care and prudence, employed or continued in his employment such incompetent person, and the accident happened or injury arose by reason of such incompetency, and the plaintiff has satisfied you of this, the burden being on him, he is entitled to recover. If he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not arise from this incompetency, he is not liable on this ground. If it was the careless act of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer, he would not be liable, so far as this point is concerned.

"It is said the defendant was negligent in suffering his engine, pump, steam gauge, fusible plug, belts and apparatus and appurtenances for safety to get out of order and unsuitable and unsafe. If you are satisfied that he was negligent in this particular, and if the injury arose from this negligence, this would render the defendant responsible. If he was not so negligent, or if the injury did not arise from such cause, the defendant is not responsible.

"It is contended that the defendant was negligent in overloading his engine, and boiler, and apparatus; in subjecting them to steam power beyond their capacity and line of safety; in fastening down the safety valve and loading the lever with unsafe weights. If the defendant, either by himself or by directions to his servants, carelessly, unskilfully and improperly did any of those acts, and the injury was caused by such negligence or want of skill, he would be liable. If he did not go beyond the line of prudence, skill and care, he would not be liable.

"The jury returned a verdict for the plaintiff, and to the foregoing rulings and instructions the defendant excepts." *Exceptions overruled.*

C. BROWNE, for defendant.

C. G. THOMAS, for plaintiff.

Thomas, J.—1. The defendant excepts to the admission of evidence that his boiler was not provided with the fusible plug prescribed to be used by the Statutes of 1850, chapter 277, and 1852, chapter 247, and the instructions of the court as to the use of such evidence when admitted. The obvious, and, we think, conclusive answer to this exception is that the evidence was admitted without objection and without any qualification or limitation, and when thus admitted it was competent evidence upon the question of the defendant's liability arising under the statute or at common law. The evidence being thus admitted, if the objection had been taken that the declaration was imperfect, an amendment would have been allowed, almost as a matter of course. But the objection was not taken, the exception was not made, and the point is not open.

2. The defendant sought to break the force of the testimony, and offered to show that it was not the custom among persons using such boilers as his to have and use such fusible plugs. The court rightly held that a custom not to observe the law could not be shown.

3. The exception to the instructions of the presiding judge, as to what was meant by ordinary care, cannot be sustained. The instructions were good sense and good law, well expressed. What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil, as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say: What would and should a reasonable and prudent man do in such an exigency? The word "ordinary" has a popular sense, which would greatly relax the rigor of the rule. The law means by "ordinary care" the care reasonable and prudent men use under like circumstances.

4. The next ground of exception, upon which the defendant relies, is the refusal of the presiding judge to instruct the jury that if the accident would not have happened without negligence on the part of the engineer, the defendant was not liable. We think such instruction could not have been given. The default of the defendant might have been, not only in having a boiler imperfectly constructed and guarded,

but an incompetent and habitually careless and negligent engineer. It is now well-settled law that one entering into the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-workmen in the course of the employment. *Farwell v. Boston & Worcester R. R.*, 4 Met. 49, 15 Am. Neg. Cas. 407, *ante*; *King v. Boston & Worcester R. R.*, 9 Cush. 112; *Gillshannon v. Stony Brook R. R.*, 10 Cush. 228 (1). It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant or use of a defective instrument. If the defendant employed a competent engineer and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance—to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard, required by law, been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it.

The case of *Hayes v. Western R. R. Corp.*, 3 Cush. 270 (2), relied upon by the defendant, proceeds upon the ground that

1. See notes of the *King* and *Gillshannon* cases on page 413, in this volume of AM. NEG. CAS., *ante*.

2. The ruling in *HAYES v. WESTERN R. R. CORP.*, 3 Cush. (Mass.) 270, 274, was followed in *Trewatha v. Buchanan Gold Mining & Milling Co.*, 96 Cal. 494, 13 Am. Neg. Cas. 474, where the court cited the case of *Kevern v. Providence Gold & Silver*

Mining Co., 70 Cal. 392, 394, 13 Am. Neg. Cas. 472, in which it was said: "The proximate cause of the injury is the object of inquiry, and when discovered must be regarded and relied on." The *Kevern* case was cited on the rule that where the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had, even though the machinery or appliances be defective. See 13 Am.

the injury was caused by the negligence of the workman, his failure to be in his place and discharge his duty, and that the train being short of hands, was wholly immaterial. Otherwise, it would be difficult to sustain it. See language of the court, p. 274.

The instructions of the presiding judge upon the liability of the master, as affected by the relation of the defendant as fellow-servant of the engineer, are not, in our judgment, liable to just exception. The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and, among others, the negligence of his fellow-servants for the protection of the master. The principle should not be so extended as to impair, in the least degree, the obligation resting upon the master in the prosecution of a business involving unusual risk of health, or life, or limb, to employ well-guarded instruments and competent agents.

Exceptions overruled.

COOMBS v. NEW BEDFORD CORDAGE CO.

Supreme Judicial Court, Massachusetts, October Term, 1869.

[Reported in 102 Mass. 572.]

MINOR EMPLOYEE INJURED BY MACHINERY—ASSUMPTION OF RISK—FAILURE TO FENCE MACHINERY—NOTICE OF DANGER—QUESTION FOR JURY—INSTRUCTING EMPLOYEE—CARE REQUIRED OF MINOR—EVIDENCE.—The fact that, very near where a workman is voluntarily employed in a manufactory, machinery not connected with his work is in motion, the dangerous nature of which is visible and constant, is not conclusive that he has taken on himself the risk of being injured by it, in modification of the implied contract of his employer to provide for him a reasonably safe place in which to do his work; and if through inattention to the danger, he meets with such an injury while doing his work,

Neg. Cas. 479. And see, also, *Vizelich v. So. Pac. Co.* (Cal., 1899), 7 Am. Neg. Rep. 6, where the same point and authority is cited.

Hayes v. Western R. R. Corp., 3 Cush. (Mass.) 270, is cited in *Hayden v. Smithville M'fg Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669, on the ruling that an employee cannot recover for

an injury suffered in the course of his employment from a defect in the machinery used by his employer, unless the employer knew or ought to have known of the defect and the employee did not know of it or had not equal means of knowledge. See 13 Am. Neg. Cas. 676.

and sues his employer therefor, the questions whether he met with it with due care on his own part, and by reason of the neglect of his employer to give him suitable notice of the danger, are for the jury; and the facts of his youth and inexperience, and the directions previously given to him by agents of the employer about the manner of doing the work, are to be considered upon the question of due notice; but the facts that the cost of covering the dangerous machinery with a box would have been slight, and that it was so covered soon after the accident, are immaterial.

Evidence that a boy less than fourteen years old and unacquainted with machinery, after being employed in a cordage factory only one day, and then at a hemp-carding machine by the side of which there was no other such machine, and never having been in a similar employment before, was set to work by his employer in a room where the noise was two or three times as loud as in railroad cars, at another hemp-carding machine where his work required his constant attention and his duty was to break off the ribbon of hemp at stated times by taking it in both his hands and drawing them apart in a manner in which he had been instructed; that by the side of this machine was a similar machine in motion, the gearing of which was unguarded, but was in plain view, was situated by the side and somewhat in the rear of the place where he would properly stand in doing his work, and so situated that in drawing his hands apart to break off the hemp his left hand would be brought very near to it; that no one pointed out this gearing to him, or cautioned him in regard to it; and that, while standing in his proper place, attending to his work and breaking off the hemp in the manner described, his hand was caught in this gearing and injured; will warrant a jury in finding that he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the gearing or manifestly incapable of performing the work there with safety, and that his employer was guilty of negligence in setting him to work in that place without proper and reasonable precautions that he should be so informed and instructed in regard to his work there, and the danger to which he would be exposed, as to enable him, with proper care and attention on his part, to avoid that danger (1).

No exception lies to the refusal of a ruling framed upon the assumption of the credibility of the testimony of particular witnesses to a point on which other testimony is conflicting.

(*Syllabus to official report.*)

1. *Minor employee, a boy, injured while cleaning gearing of machinery—Negligent act in starting machinery—Fellow-servant rule.*—In *CURRAN v. MERCHANT'S MANUFACTURING COMPANY*, 130 Mass. 374 (February, 1881), minor employee injured by machinery, plaintiff's exceptions were *overruled*, the case being stated by SOULE, J., as follows:

"The plaintiff in the first count of

his declaration alleges that he was injured because the defendant, his employer, managed its machinery so negligently and carelessly that it was unsafe and dangerous. In the second count, he alleges that he was taken from the work for which he was employed and set to cleaning out the gearing of a mule frame, which was an unusual employment for him, in which he was not instructed or

TORT in the plaintiff's name by his next friend. Writ dated March 30, 1867. The declaration was as follows: "And the plaintiff says he was employed by the defendants, and, being then of the age of fourteen years, was by the defendants imprudently, negligently and carelessly set to work in their manufactory without any caution or instruction, in an unsuitable and unsafe place, and very near and by certain dangerous, unfenced and unguarded machinery, whereby the plaintiff was exposed to great and unnecessary risks, and risks not required by his employment, and whereby the plaintiff, while employed at his duty, as aforesaid, and using due care, was injured, and his hand was caught and drawn into the machinery and destroyed, and the plaintiff was subjected to great

skilled, and was to be attended to in an unusual place for him to work; that the gearing was still and in a safe condition for him to work on it, but while he was so at work it was carelessly and negligently set in motion by the defendant, and his hand was hurt; and that the defendant knowingly and carelessly employed unskilful, inexperienced and incompetent overseers or men in charge, by whose act the machinery was set in motion.

"It is clear, therefore, that the action does not proceed on the ground that the machinery was unsuitable for the purpose for which it was intended, nor that it was not in good running order. The foundation of the action is negligence on the part of the defendant in managing its machinery, the only negligence specifically stated being in knowingly and carelessly employing unskilful and incompetent overseers or men in charge, by whose act the machinery was started.

"It is familiar and well settled law in this commonwealth, that an employer is not liable to his servant for injuries caused by the negligence of a fellow-servant. The plaintiff was evidently aware of this principle, and inserted the allegation that the defendant knowingly and carelessly em-

ployed unskilful and incompetent overseers in the hope of bringing his case within the other principle of law, which imposes on employers the duty to his servants not to employ as their fellow-servants persons who are known to be unskilful and incompetent, when such want of skill and ability may expose the servants to dangers of bodily injury, which would not exist if skilled persons only were employed as their fellow-servants."

* * *

"It was contended at the argument, that the case was taken out of the ordinary line of cases in which the servant is an adult by the fact that the plaintiff, who was fourteen and a half years of age, and had worked in the mill two and a half years, was of tender years, and was set to work in an unusual place, doing what he was not accustomed to do. But the evidence was that the work he was doing was precisely like that he had been accustomed to do from time to time during the whole term of his employment by the defendant, and that his injury did not proceed from the fact that he was working in dangerous proximity to other machinery over which he had no control. This case has no similarity, therefore, in this respect, to that of *Coombs v. New*

pain and suffering for a long time." The answer was a general denial of these allegations, except that the plaintiff was in the defendants' employment and was injured.

At the trial at April term, 1868, before Foster, J., the plaintiff introduced evidence tending to show that he became thirteen years old on December 22, 1865, and on the morning of Monday, August 12, 1866, went to work, with his father's knowledge, in a room in the defendants' ropewalk; that in this room hemp, which the defendants were manufacturing, was passed through three "breakers" and three drawing machines; that Thomas Whiteside, the overseer, set him to work with James H. Davenport, a boy seventeen years old, at one of the hemp-drawing machines, and told Davenport to

Bedford Cordage Co., 102 Mass., 572 (the case at bar), on which the plaintiff relied. Exceptions overruled."

Minor employee, a girl, injured while cleaning machinery—Failure of employer to give instructions.—In *GLOVER v. DWIGHT MANUFACTURING Co.*, 148 Mass. 22 (November, 1888), minor employee injured while cleaning a wheel of a spinning frame, defendant's exceptions to verdict returned for plaintiff were *overruled*. The Supreme Court (per MORTON, J.) said: "At the trial the plaintiff relied upon the last count in her declaration, in which she alleges that she was injured by the negligence of the defendant in not giving her proper instructions as to starting, stopping, and cleaning the machine upon which she was set to work. The duty of an employer to take proper precautions for the safety of a person employed in running or tending machinery, and, where such person is young and inexperienced, to give him proper instructions so as to enable him to understand and appreciate the danger attending his employment, is fully considered in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

"In the case at bar, the plaintiff, a girl of thirteen years of age, was set to work upon spinning frames, her

duty being to piece up ends, to keep the roping in, and to clean up. In attempting to clean a wheel at the end of the spinning frame, her finger was caught between a spoke of the wheel and the end of the frame, and she was injured. She testified that she had never been told how to clean the wheel, but attempted to clean it by doing as she had seen the other help do; that she had never before attempted to clean a wheel when the speed was on; that "the proper way to clean the wheel was to wipe one spoke at a time with a piece of waste, and, in order to bring the spokes into position to be wiped, it was necessary to give the wheel a partial revolution each time by means of a peculiar movement of the shipper above the frame;" and that "she had never been instructed how to give this peculiar motion to the shipper in order to secure a partial revolution of the wheel."

"The jury viewed the premises, thus gaining a clear knowledge of the character of the machinery, and, if they believed the plaintiff, were justified in finding that the defendant was guilty of negligence in setting the plaintiff to work upon dangerous machinery without giving her proper instructions." * * *

teach him to tend it, and Davenport did so; that he was so employed throughout that day, and by the end of the day was able to tend it well; that the next morning he resumed work with Davenport, and after an hour or two was transferred by Alden Macomber, who was overseer when Whiteside was absent, to another hemp-drawing machine in the same room, to work with a boy named Manchester; that the hemp-drawing machines were nine or ten feet long, about three feet wide and four feet high, had gearing projecting from their sides, and were worked by two persons, usually by boys, the work on them being considered "boys' work;" that the hemp was put in by one person at one end of the machine and drawn through it, and issued from the other end in the form of a ribbon, through a spout three or four inches wide, into a movable tin can, set on the floor about six inches below the spout, and attended by the other person, whose duty was to guide the ribbon into the can and press it down, break it off when the can was full, and then move that can away and set another one under the spout; that there was some difference in construction between the machine on which the plaintiff worked with Davenport and that to which he was transferred, the ribbon being accumulated in a pile on the floor at the first machine when the can was filled, and at the second machine being heaped up on top of the can, but in their general features the two were similar; that their relative situation to other machines was, however, different, the machine on which the plaintiff first worked not being near any similar machine, but the second machine, to which he was transferred, being for some distance parallel with the third such machine, and so situated that the gearing on the side of this third machine was on the left of and near to the person tending the can of the second machine, while on the right of such person there was a vacant space several feet wide; that this gearing was "three feet and a half from the floor," and consisted of five or six cog-wheels playing upon one another, varying in diameter from two inches to a foot, projecting about two inches from the side of the machine, and "all taking up a space of from eighteen to twenty inches," and that the distance from the spout of the second machine to this gearing was eighteen inches, and the distance between the two machines at the point where they came nearest to each other eleven inches.

The plaintiff testified that Macomber, when he transferred

him to the second machine, said that Manchester would "show him how to tend the machine." He also testified: "The machine was at work when I went to it, and Manchester was at the end where I worked. At the other end was another boy, who went off, and Manchester took his place." "The overseer said Manchester would show me, but he didn't. He told me when the can was full to pass it away. I knew enough to fill the can when the hemp came out and to break it off." "Manchester told me when the can was full to break off the hemp, pass away the can and get another. I filled one can and passed it away; and when the second can was full and I was breaking the hemp off my hand caught in the gearing of the other machine on the left that I had nothing to do with." "The gearing of the other machine caught the back of my left hand, drew it in, and ground it there for a minute. Manchester halloed to a boy named Ryley, who was at the can of the machine that caught my hand. He threw off the belt, stopped the machine, ran it back and I pulled out my hand, which was all ground up." "The two wheels that caught my hand were a little larger than the top of a hat. They stuck out from the side of the machine on which they were about two inches. Their teeth were half an inch wide. The cog-wheels were in sight; and I could see them when I had nothing to do but look at them, but not when I was attending to my work. I never was left-handed." The plaintiff further testified that he had stated all that was told to him when he was set to work.

Asa Coombs, the plaintiff's father, who was a shipwright, testified that, between two and three months after the accident he visited the ropewalk and Macomber showed him the machine in which the plaintiff's hand was caught; and that at this time the cog-wheels on the side of it were covered with a wooden box, "which made them perfectly harmless;" that it would take about two hours, and might, at the utmost, cost a dollar and a half to make such a box. He further testified that on April 3, 1868, just before this trial, he visited the ropewalk again, and that at this visit there was no box over the gearing.

James H. Davenport testified that, in tending the spout of hemp-drawing machines "the place for the boy to stand is right in front of the machine, with the can between him and the machine, so as not to tip it over," and that "there is no

knack about breaking off the hemp, and one could learn how in two or three weeks, or two or three days if instructed; " that when he first went to work in the ropewalk he was thirteen years old, and was set to tending the spout of such a machine.

John Davenport testified that he was forty-nine years old, worked in the ropewalk from 1845 till January, 1868, and was there when the plaintiff was injured, but did not witness the accident; and further testified: " I have run these drawing frames (I think the one where he was hurt), and have steered the hemp into the cans. You must press the hemp down or it will run out on each side. It is the boy's or man's duty to keep his hand there constantly. Boys are generally put upon these machines. The hemp is springy, and the stream is about two fingers wide. If you let it run over, you must pick it up and put it in again. Some are handy at breaking off the hemp. A boy after one or two days' practice is not so well qualified to break it off safely as after a longer time. The machine can be stopped when the can is full by throwing off the belt. Sometimes they stop it and sometimes not. There is not much knack in breaking the hemp off. It is done by parting the hemp, not by tightening it up. If you grasp it close, you cannot break it off. If you part it a good way off, it is easily done. (Here the witness parted his hands widely to show how.) A boy tending a drawing machine stands in front of the can and of the machine. This is the proper place. He is obliged to stand there to watch his work. The boy on one machine has no control over the other." On cross-examination he testified: " All the drawing machines are on the same principle. One boy stands behind the machine to feed it, and another in front to guide the hemp coming into a can. It is light work, and done by a man only in the absence of a boy. When the can is full the machine can be stopped by the boy tending the ribbon. There is a lever for that purpose, by throwing off the belts on to a loose pulley. On the right hand of the boy tending the plaintiff's machine there is plenty of space and no danger; on the left not much space. The wheels are right in plain sight. The hemp draws out like hay, separating at the end of the staple. Whether you stop the machine depends on the amount of hurry; on outside circumstances; on the boy's will."

" The foregoing evidence was all of the plaintiff's case,

except testimony as to the extent of the injury. The defendants contended that it would not warrant a verdict against them, first, for want of proof that the plaintiff when injured was using due care, and, secondly, because there was no evidence of fault or negligence on their part for which they could be held liable. The judge withdrew the case from the jury and reported these two questions for the determination of the full court: If, upon the foregoing evidence, it would be competent for a jury to render a verdict for the plaintiff, which the court would not set aside *toties quoties*, the case to stand for trial; otherwise judgment to be rendered for the defendants." The argument on this report was had at October term, 1868. *Case to stand for trial.*

T. D. ELIOT and T. M. STETSON, for plaintiff.

J. C. STONE, for defendants.

Hoar, J.— This case presents an extremely interesting question, and one of much practical importance in relation to the duties and responsibilities of employers to those whom they employ. The arguments of counsel have taken a very wide range, and have brought to our notice a very large mass of authorities, which, though we have examined and considered them as carefully as the nature of the case seemed to require, we do not think it necessary to review in detail.

The leading principles of law upon which the rights of the parties depend are simple and well defined, and have been frequently stated in judicial decisions. Thus, it is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-workmen in the course of the employment. *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49, 15 Am. Neg. Cas. 407, *ante*; *King v. Boston & Worcester R. R. Co.*, 9 Cush. 112; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228 (1). On the other hand, the principle is perfectly established that an employer is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dan-

1. See notes of the King and Gillshannon cases on page 413, *ante*.

gers that do not come within the obvious scope of his employment. *Cayzer v. Taylor*, 10 Gray, 274, 15 Am. Neg. Cas. 500, *ante*; *Seaver v. Boston & Maine R. R.*, 14 Gray, 466; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, *ante*; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233, and 13 Allen, 433, 15 Am. Neg. Cas. 426, *ante*.

There is another class of cases in which it has been held that, if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care. *Sweeny v. Old Colony & Newport R. R.*, 10 Allen, 368, 12 Am. Neg. Cas. 75*n*; *Elliott v. Pray*, 10 Allen, 378; *Zoebisch v. Tarbell*, 10 Allen, 385. In the first of these cases the rule is stated by Chief Justice Bigelow in these words: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence."

It is in the application of these principles to a new state of facts that the difficulty arises; and the case at bar is certainly one that comes very near the line. The plaintiff received the injury of which he complains from his hand being caught in the cogs of a machine, which was running within a foot or two of the place where he was set to tend another similar machine. The work in which he was employed would naturally occasion him to extend his arms and hands in such a manner as to bring his fingers very near to the cogs. But the cogs were in sight, and the danger of getting the fingers into them manifest; and it is argued, on behalf of the defendants, 1, that the facts show that the plaintiff did not use due care; and, 2, that they were under no legal obligation to fence or inclose the dangerous machinery, or to protect the plaintiff against a peril which, being visible and permanent, came within the risks which he assumed by entering upon the employment.

Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a

want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw or might have seen the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it. *Reed v. Northfield*, 13 Pick. 94; *Whittaker v. West Boylston*, 97 Mass. 273.

Upon the other question reserved we have entertained more doubt; but upon a careful examination we are all of opinion that there is sufficient evidence to go to the jury upon that also.

There is no statute of this Commonwealth which requires machinery to be fenced or boxed as a precaution against accidents; and most of the decisions under the English statute upon the subject have, therefore, no application. Nor can it be doubted that it is the legal right of every person to carry on a business which is dangerous, either in itself or in his manner of conducting it, if it is not unlawful and interferes with no right of other persons. The evidence which was introduced to show that the defendants could have guarded their machinery by boxing it at a very trifling expense, and that they actually did cover it in that way immediately after the accident to the plaintiff, was immaterial. If the plaintiff, being of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and with full notice of the dangerous nature of the service which he undertook, chose to contract to do it, then he assumed the risk, which was clearly within the scope of his employment, and his employer was under no obligation to indemnify him against the consequences. Thus, in *Priestley v. Fowler*, 3 M. & W. 1, which was an action by a servant against a master for injuries received in consequence of the breaking down of an overloaded van, it was held that the master was not liable, because the fact that the van was overloaded was as well known to the servant as to him. The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant,

being fully capable of choosing and contracting for himself, and with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or unsuitable tools, machinery or appliances, no such implied contract arises. As was said by Chief Justice Cockburn in *Clarke v Holmes*, 7 H. & N. 937: "No doubt the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment."

The case of *Clarke v Holmes*, *supra*, is one which it is not easy to place upon any very well-defined principle. The plaintiff was an adult workman, who went to work with machinery about him which was properly fenced for his protection. It afterward became unfenced, and he knew its condition, and complained of it to his master, who promised that it should be fenced again. He kept on with his work, and was injured. The jury found that his master was negligent, and that he was not; and his action against his master for compensation for his injury was sustained by the court. Chief Justice Cockburn says that "there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied." Mr. Justice Byles observed that, the contract being to work with fenced machinery, when it was broken by the master it might be regarded as a species of compulsion. But he added a remark which seems to point to a distinction of more importance in the case we are considering than in the one in which it was made: "Besides, a servant knowing the facts may be utterly ignorant of the risks."

The case most nearly in point, of any which has been brought to our notice, is *O'Byrne v Burn*, 16 Cas. in Court of Session (2d series), 1025, cited with apparent approbation in *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, and *Bartonshill Coal Co. v. Maguire*, 3 Macq. 300. It was a Scotch case, in which the plaintiff was a girl employed by the defendant in his clay-mill; altogether inexperienced, having been only nine days in his service, and unaware of the risks from the machinery. The superintendent put her to remove some waste clay while

the rollers were in motion, and she was injured; and it was held that she could maintain her action. Lord Cranworth's comment upon it is in these terms: "This might have been quite right. It may be that, if a master employs inexperienced workmen, and directs them to act under the superintendence and obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work." "They are acting in obedience to the express commands of their employer; and, if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences." 3 Macq. 295. And Lord Chelmsford adds: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." *Ib.* 311.

The case of *Indermaur v. Dames*, Law Rep. 2 C. P. 311, furnishes a slight analogy to the present. A gasfitter's man was sent to the defendant's factory to inspect meters, and was hurt by falling down an unfenced shaft. It was held that he was not a mere volunteer, but came upon the premises under such conditions that he was entitled to protection against an unknown danger. Kelly, C. B., said, in delivering the opinion in the exchequer chamber: "If a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound to put some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him" (1).

Upon the new trial of the case at bar the jury should be instructed that the defendants had the legal right to run their machinery without fencing or boxing it, unless by so doing they exposed persons in their employment, or other persons who came upon the premises by their procurement or invitation, to danger of which they gave no sufficient notice; that, if by the fact that the cogs were in sight and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed,

1. The English cases are sufficiently stated in the opinion in the case at bar.

and, understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that, if, on the other hand, they should be satisfied that the defendants knew, or had reason to know, the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and, if he, without any negligence on his own part, from inexperience or reliance upon the directions given him, failed to perceive or appreciate the risk and was injured in consequence, they would be responsible to him in this action.

Case to stand for trial.

THE COOMBS case was accordingly tried at April term, 1869, before Wells, J., and, after a verdict for the plaintiff, was again reported for the revision of the full court, substantially as follows:

"Upon the trial at this term the evidence upon the part of the plaintiff tended to show these facts: In August, 1866, the plaintiff, being then under the age of fourteen years, by three or four months, with the knowledge and consent of his father, applied to the defendants for employment in their mill or cordage factory. He had never been so employed before that time, having been till then at school. The defendants received him into their employment; and on the first day, Monday, August twelfth, he was set at work to fill cans with the roping or strands of manila as it came from the drawing machine, with another boy named Davenport, who was directed to instruct him in the process, and who did so during that day and for a short time on Tuesday morning. The work was to see that the strands went into the can, to press them down and fill the can, then to break off the strands and remove the can to the place where it was required for the next process, and to set another can under the machine for a repetition of the operation. In the course of the morning or early forenoon of Tuesday Macomber, the overseer in charge, took the plaintiff to another machine in the same room and set him to do similar work there. He directed Manchester, a boy who had been doing that work, but who was then taken off in order to attend to the feeding of the machine at its other end, that he should show the plaintiff how to do his work there.

"The machine was not materially different from the one upon which the plaintiff had worked the day before; but the strands were of hemp instead of manila, and parted more easily than the strands of manila, though very little force was

required to part either, as they were both of loose untwisted fibre. At the left hand, and near the place where it was proper and necessary for the plaintiff to stand to do his work, there was another drawing machine in operation, driven by the same shaft below the floor, but bearing in the opposite direction from the shaft, and standing parallel to the machine on which the plaintiff worked. Upon the side of that machine was a combination of eleven gears of various sizes, working upon each other with cogs. The two machines at the nearest point were about eleven inches apart; and the distance from the rollers, through which the roping was discharged from the machine upon which the plaintiff worked, to the nearest point in the circumference of the gears was about eighteen inches. The distance from the extended center line of one machine to the face of the gearings of the other was about twenty-two inches. The gearings were uncovered, and without any guard, and in plain view; but the position in which a person would properly stand while tending the machine upon which the plaintiff worked would bring the gearings upon his left hand and somewhat to his rear.

"The evidence also tended to show that the mode of breaking off the strand was either by taking it with both hands and separating the fibres by drawing it apart between the hands, or by taking the strand in one hand and drawing directly back while the other end was held fast in the rollers; that when the machine was stopped the latter mode was usually, though not always, adopted, but when the machine was in motion it was necessary to do it in the first mode, with both hands; that generally the machines were stopped when the cans were filled, and that there were appendages at each end of the machine for stopping and starting the machine; but that when the work was behindhand the ends were sometimes broken off and cans changed without stopping the machine; and there was evidence from which the plaintiff's counsel contended that the work of the machine upon which the plaintiff was employed at the time of the accident was behindhand on that Tuesday morning. It appeared from the testimony of the plaintiff and Davenport that while the plaintiff worked with Davenport the machine was stopped every time the can was changed; and that it was necessary to stop that machine on account of the manner in which they filled the can, which was to push it aside when full and form a coil upon the floor; when the coil

was sufficiently large the machine was stopped, the strand parted and the coil taken up and placed upon the top of the can. It also appeared that while he worked with Davenport the strands were separated by using both hands and parting the strands between the hands.

"The plaintiff testified that when Macomber set him at work upon the other machine on Tuesday he told him that Manchester would show him about his work, and that Macomber told him nothing else; that Manchester told him 'when the can was full to break off and keep the girls supplied.' And the plaintiff testified: 'He gave me no directions how to break it off. I broke it by pulling it apart with both hands. I got my hand into the cogs of the other machine.' He also testified that he did not know anything about machinery; that he was standing right behind the can when the accident happened; that he was tending his machine, looking at it; that there was considerable noise in the mill, two or three times as much as in railroad cars; that he did not stop the machine to break off the strands; that no one told him not to break off the strands without stopping the machine, and no one pointed out the cogs to him or cautioned him in regard to them, and that when he was transferred to the other machine on Tuesday, or afterwards, no one gave him any instructions in regard to the manner in which he should do the work there; that only two cans were filled after he was so transferred, and in breaking the strand after filling the second can his hand was caught.

"It also appeared that there was no other machine at the side of the place where he worked on Monday, and that in filling the cans at the machine to which he was transferred on Tuesday the coil was formed upon the top of the can and not upon the floor, that being the usual mode at that machine.

"There was testimony tending to show that it required constant attention to fill the cans properly and prevent the strands from escaping and falling outside of the can, and also that some of the hemp was found with his hand in the cogs of the machine by which it was caught.

"The defendants called Macomber, who testified that when he set the plaintiff to work upon the other machine on Tuesday he pointed out the gearings to him and cautioned him against getting caught there; that he showed him how to fill one can and break off the end by stopping the machine and drawing

the strand directly back with the right hand, the other being fast in the roller, and that he directed Manchester to look after him.

"Manchester testified that he also pointed out the gearing of the other machine near the plaintiff, and cautioned him against coming in contact with it, and also instructed him how to do the work by filling six cans and stopping the machine and breaking off the end in the manner described by Macomber; and that he showed the plaintiff how to stop the machine and start it up again; that he went to that end of the machine to assist and direct him about the next three cans, which were filled by the plaintiff, and that, in parting the strand upon the third can, the plaintiff threw his left hand round and struck the gears and was caught.

"The plaintiff denied the whole of these statements, and there was other testimony, both in contradiction and in corroboration of the witness, Manchester.

"The defendants requested the following instruction: 'If the jury are satisfied that Macomber and Manchester pointed out to the plaintiff the danger from the gearing where he was injured and cautioned him against it, so that, at the time, he saw it and understood that contact with it would be dangerous, the defendants would not be liable.' I declined to give the instruction in this form. But I instructed the jury, among other things, that, if this plaintiff could recover, it must be because, from his youth, inexperience and want of capacity to appreciate and avoid the danger, it became the duty of the defendants to take especial precautions for his protection, which they had failed to do; that the plaintiff must show some breach of duty towards him by the defendants; that, if he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety, there might be a breach of duty on the part of the defendants in placing him in a position where he would be so exposed, or, placing him there, in not giving him such instruction as would enable him, with reasonable care and attention on his part, to do his work there safely; that, if they found that the defendants were guilty of negligence in either of these respects, they would be liable, if the plaintiff himself was in no fault; that the question was not whether the place was more dangerous than was necessary, or than is usual in similar mills,

nor whether it might have been made more safe with slight expense or by reasonable care, but whether, taking the machines as they were, in the places they were in, the defendants were guilty of negligence in setting the boy to work in that place without proper and reasonable precautions that he should be so informed and instructed in regard to his work there and the danger to which he would be exposed as to enable him, with proper attention and care on his part, to avoid that danger. The jury were also instructed fully as to the care required upon the part of the plaintiff. No objections were made to any of the instructions given to the jury, except by the request for the instructions as above recited.

"The jury returned a verdict for the plaintiff in the sum of \$5,008.33. After verdict the defendants moved that the verdict be set aside and a new trial granted, for several reasons, among which were, that the verdict was against the evidence and against the law as given to the jury upon the trial. I overruled this motion; but, entertaining some doubt as to whether, upon the facts and the testimony in the case (which are herein stated in full, so far as they relate to this question), the plaintiff had so far shown that the accident occurred without fault or want of due care on his part as to entitle him to retain the verdict in his favor, I report the case for revision by the full court. If the court shall be of opinion that the refusal to give the instruction asked for was erroneous, or that, upon the facts and testimony stated above, the plaintiff ought not to retain his verdict, the verdict is to be set aside and a new trial granted; otherwise, judgment to be entered upon the verdict." *Judgment for plaintiff.*

B. R. CURTIS and G. MARSTON, for the defendants, argued in substantial conformity with the argument made in the defendants' behalf on the former report.

Gray, J.—The rulings and instructions at the second trial of this case appear to us to have been in strict conformity with the law and with the former opinion of the full court.

In that opinion the general principles were fully recognized and asserted that any person who allows a dangerous place to exist on his premises is responsible for an injury caused thereby to any other person who enters on the premises by his invitation or procurement, in the use of due care and without notice of the danger; that an employer is under an implied contract with his servant to find suitable instruments and

means of carrying on the business, and a suitable place in which the servant, himself exercising due care, may perform his duty without exposure to dangers not coming within the obvious scope of his employment, and that the implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability.

In applying these principles to the present case it was said that "if the plaintiff, being of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and with full notice of the dangerous nature of the service which he undertook, chose to contract to do it," he assumed all such risks as were clearly within the scope of his employment, and no implied contract could arise on the part of the master to indemnify him against the consequences of such risks; and "that if, by the fact that the cogs were in sight, and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed, and, understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that if, on the other hand, they should be satisfied that the defendants knew, or had reason to know, the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he, without any negligence on his own part, from inexperience, or reliance upon the directions given him, failed to perceive or appreciate the risk, and was injured in consequence, they would be responsible to him in this action." And the question of the defendants' negligence in this respect was ordered to be submitted to the jury.

The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and

necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere information in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work.

The instructions given were carefully framed and well adapted to impress the true distinctions upon the minds of the jury. The jury were expressly told that the question was not whether the place was more dangerous than was necessary, or than is usual in similar establishments, nor whether it might have been made more safe by reasonable care; that the only ground on which the plaintiff could recover was that because of his youth, inexperience and want of capacity to appreciate and avoid the danger, it was the duty of the defendants to take especial precautions for his protection, which they had failed to do, and that, if he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the gearings, or manifestly incapable of performing with safety the work at the place where he was put to do it, there might be a breach of duty on the part of the defendants in placing him in a position where he could be so exposed, or placing him there without giving him such instruction as would enable him, with reasonable care and attention on his part, to do his work here safely.

The plaintiff had introduced evidence tending to show that at the time of the injury he was less than fourteen years old and had been in the defendant's service but a single day; that he knew nothing about machinery, and had never been in a similar employment before; that his work consisted in filling cans with strands of hemp, poured out in a continuous stream from a drawing machine, which required his constant attention, in a room containing many such machines, and in which the noise was two or three times as loud as in the railroad cars; that he had to see that the strands went into the can,

press them down and fill the can, and then break off the strand and remove the can to the place where it was required for the next process, and set another can under the machine for the repetition of the operation; and that he had been instructed, and in the condition of the work at his machine at the time it was necessary, to break off the strand by taking it in both hands and separating the fibres by drawing it apart between the hands, which, as was said by Mr. Justice Hoar, in delivering the former opinion, "would naturally occasion him to extend his arms and hands in such a manner as to bring his fingers very near to the cogs" of another drawing machine, **also in full operation, in plain view, indeed, but without any guard, and by the side and somewhat in the rear of the place in which the plaintiff would properly stand in tending his machine** — thus producing a danger which had not existed in the place where he had worked on the single previous day of his employment in the defendants' service, and which, as he testified, no one had pointed out to him or cautioned him in regard to, and that, while standing in his proper place, tending and watching his machine, and in breaking off the strand with both hands after filling the second can, his left hand was caught in the cogs of the next machine and badly injured.

This evidence, if believed by the jury, warranted them in finding, in the words of the instructions given, that "he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety," and that, "taking the machines as they were, in the places they were in, the defendants were guilty of negligence in setting the boy to work in that place without proper and reasonable precautions that he should be so informed and instructed, in regard to his work there, and the danger to which he would be exposed, as to enable him, with proper attention and care on his part, to avoid that danger."

The duty of providing suitable machinery to carry on their business, and a suitable place for the plaintiff to work in, including giving him full notice of the nature of the risks attending the service, was a responsibility resting upon the defendants, which they could not throw off by delegating it to a foreman or to other workmen. *Gilman v. Eastern R. R. Co.*, 13 Allen, 433, 441, 15 Am. Neg. Cas. 426, *ante*; *Smith on Master and Servant* (3d ed.) 212. In *Grizzle v. Frost*, 3 Fost. & Finl.

622, a girl under sixteen years of age, who had never been in such employment before, entered into an employment precisely like that of the present plaintiff. She testified that she received no particular instructions; that a few days after she entered into the employment the defendants' foreman, observing that some of the hemp dropped from the machine, told her to pick it up and put it between the rollers without having them stopped in a manner which he showed her, and which made it necessary to bring the fingers very close to the rollers, which was admitted to be very dangerous; and that two or three days afterwards, while doing exactly as she had been directed, her fingers were caught by the revolving rollers. Chief Justice Cockburn instructed the jury that "if the owners of dangerous machinery by their foremen employ a young person about it quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware, as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

Upon the question of due care on the part of the plaintiff the state of facts which the evidence introduced by him at the second trial tended to show made quite as favorable a case for him as that which was held upon the first argument proper to be submitted to the jury. The case is within the same principle as *Hackett v. Middlesex Manufacturing Co.*, 101 Mass. 101, 104 (1), in which this court said: "It can hardly be expected that workmen will not move a little while they are engaged about their work; and if they are exposed to danger from defective machinery, of which they are unaware, the question is, whether they were in a position such

1. In *HACKETT v. MIDDLESEX MANUFACTURING Co.*, 101 Mass. 101, where plaintiff, an operative in defendant's factory, was injured by the fall of the platform of an elevator, caused by a defect in its main chain, it was held that the case was for a jury, and plaintiff's exceptions were sustained. The Supreme Court (per HOAR, J.) said: "The injury was received by the plaintiff while in the course of

his employment, and from a defect in the machinery belonging to and furnished by the defendants. Whether this defect was the result of the defendants' neglect or want of care in omitting to ascertain its condition, was one question for the jury. If this was proved, it is still objected that the plaintiff's exposing himself to the danger was unnecessary and voluntary. In a strict and absolute sense

as, without carelessness, they might be reasonably and naturally expected to occupy, and not improper for a person so employed. This is a question of fact, under all the circumstances of the case, and not of law." In determining whether there was sufficient evidence upon this question to be submitted to the jury, it is hardly necessary to observe that the conflicting testimony introduced by the defendant cannot be taken into consideration.

The refusal of the presiding judge to give the instruction requested affords no ground for granting a new trial, because he was not bound, when the testimony was conflicting, to give an instruction based upon an assumption of the credibility of particular witnesses; and because the subject of the request was fully and accurately covered by the instructions given. *Bailey v. Bailey*, 97 Mass. 373; *Laber v. Cooper*, 7 Wallace, 565. Judgment on the verdict for the plaintiff.

SULLIVAN v. INDIA MANUFACTURING CO.

Supreme Judicial Court, Massachusetts, November Term, 1873.

[Reported in 113 Mass. 396.]

MINOR EMPLOYEE INJURED BY MACHINERY—FAILURE TO FENCE MACHINE—INSTRUCTING EMPLOYEE—NOTICE.

—The mere omission of a master to enclose machinery, which he was not required by law to cover or fence, does not, of itself, render him liable to a servant injured by such machinery, which injury might have been prevented had the machinery been enclosed (1).

perhaps this is true. The plaintiff was not required to look down to see whether the beam was ready, or to put his head under the descending elevator. But we think this is too rigid a rule to be applicable to the common affairs of life. It can hardly be expected that workmen will not move a little while they are engaged about their work; and if they are exposed to danger from defective machinery of which they are unaware, the question is, whether they were in a position such as, without carelessness, they might be reasonably and naturally expected to occupy, and not

improper for a person so employed. This is a question of fact, under all the circumstances of the case, and not of law."

1. *Minor employee, a boy, injured by machinery—Failure to fence—Employer not liable.*—In *ROCK v. INDIAN ORCHARD MILLS*, 142 Mass. 522 (October, 1886), plaintiff's exceptions on verdict returned for defendant were *overruled*, the facts being stated by MORTON, Ch. J., as follows: "The plaintiff, who is a boy thirteen years old, was injured, while in the employ of the defendant,

A request to charge that if the master gave no instruction to a minor employee as to machinery other than "to do as the other boy before him did," the master was negligent, was properly refused, for it might have been that, although the boy was injured his own negligence, and not that of the master, was the cause of it.

The master's personal neglect to give instructions to a minor employee as to machinery will not render him liable for injury to the employee, where such duty was properly delegated and performed.

TORT for an injury from the gearing of a machine in the defendant's mill, whereby the plaintiff's arm was crushed.

At the trial in this court, before Wells, J., it appeared that the plaintiff at the time of the injury was about fourteen years of age, and was employed to supply certain drawing machines with filled cans, and to remove the cans when empty. The

by getting his hand in a machine called a "winder." This is a machine about four feet and four inches long and two feet and ten inches high, consisting of three smooth steel cylinders, two large ones with a small one between them, on which cotton is wound. They revolve about fifteen to twenty times a minute. The gears and pulleys connected with them were covered, but there was no fence or other protection against danger from the other part of the machine. A machine called a "card grinder" stood about four and a third feet from the winder, and the plaintiff was required to pass between these machines in doing his work.

"The plaintiff had been in the employ of the defendant three weeks and three days when he was injured, and, in the course of his work, had to pass this machine about six times a day; but he did not work on it. It is clear that the winder was not a peculiarly dangerous machine, and that the defendant could not be held liable merely because of a neglect to fence it. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*; *Sullivan v. India M'fg Co.*, 113 Mass. 396 (the case above reported).

"It was the duty of the defendant

to give suitable instructions to the plaintiff, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they were, of the employment in which he was engaged; and, as nothing appears to the contrary, we must assume that the court gave appropriate instructions to the jury upon this point.

"The defendant was not required by law to fence this machine, but had the right to use it in the manner in which it did, if it sufficiently instructed the plaintiff as to the dangers of the machine, he took the risk of those dangers, and cannot recover because the machinery might have been set up so as to be less dangerous.

"The issue before the jury was whether the defendant had given the plaintiff such instructions; and the court rightly rejected evidence offered by the plaintiff to show that a gate might have been put up, at slight expense, in front of the winder, or that the winder or the card-grinder might as well have been put in another part of the room. *Coombs v. New Bedford Cordage Co.*, *supra*, and *Sullivan v. India M'fg Co.*, *supra*." * * *

two machines which it was his duty to attend stood parallel, the one to the other, with a narrow space between them. The gearing (or wheels with cogs) was upon the side of the machine next to this narrow space. Upon the other side of the machine causing the injury was a wider space leading in the direction of the place from and to which the cans were to be brought and removed. Whether the plaintiff was instructed to pass by the way of this wider space was in dispute. The overseer of the room testified that he was so instructed. This the plaintiff denied, and testified that he received no instruction or caution, except to do as he saw another boy do who had preceded him in the same work, and that the other boy went through the narrow space. The overseer denied that he gave any such direction, and denied that the other boy, or any one, unless without his knowledge and contrary to his instructions, ever used the narrow passage in doing this work. In attempting to pass through the narrow passage between the machines with two filled cans, pushing one before and dragging one after him, the plaintiff's sleeve was caught in the cogs and his arm drawn in and so crushed that amputation was necessary.

The plaintiff had previously been employed for several months in the Naumkeag Cotton Mills, where his work was about the machinery, though he had no management of it, otherwise than in cleaning it when stopped. He had been at work for the defendant three or four weeks when injured. When first employed he was set to assist at similar machines in another part of the same room. The "second hand" for that part of the room testified that he pointed out the gearing upon those machines corresponding to that in which he was afterwards injured, and cautioned him in regard to them. The "second hand" for the part of the room where he was injured was not a witness.

The plaintiff contended that the defendant was guilty of negligence in not guarding the gearings by some covering, or by other means, to protect persons from the exposure. But the court ruled that the defendant was not bound to cover or fence the machinery, and could not be made liable for the injury merely from neglect to do so. That, if liable at all, it was because the boy was manifestly so incapable of understanding the nature and extent of the danger as to be unable

to perform his work there safely without instructions or cautions that were not given him.

There was no evidence of anything uncommon in the machine making it peculiarly dangerous; the danger arose from the rapid revolution of cogs in a beveled gear facing the narrow space or passage between the two machines. The plaintiff offered to show that the defendant protected the machinery in other rooms of the mill, and also that the machine upon which the plaintiff was hurt had been protected after that time. But the court ruled that such evidence would be immaterial and incompetent.

The plaintiff contended that any cautions given by the overseer would not avail to protect the defendant. But the court ruled that if the plaintiff had such instruction, caution, information or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not liable, and that it made no difference whether he derived it from the defendants's officers, from a second hand in another part of the room, from a stranger, or from his own perceptions and intelligence.

The plaintiff requested the following rulings:

"1. That, if no instruction was given the plaintiff as to the route in going to or from the machine at which he was injured, except 'to do as the other boy before him did,' and he did so, and was injured, there was negligence on the part of the defendant.

"2. That the duty of cautioning a boy of the plaintiff's age, and giving him full notice of the risks attending the work, is a responsibility from which the company cannot free itself by delegating it to a foreman or to a second hand.

"3. That the failure of the company to guard its machinery where the plaintiff was injured (it being guarded in the other rooms), was evidence from which the jury might find negligence on the part of the defendant."

These instructions the court declined to give. The verdict was for the defendant, and the case was reported for revision by the full court. If any of the rulings or refusals to rule were wrong and material to the issue, a new trial was to be had; otherwise judgment was to be entered on the verdict. *Exceptions overruled.*

D. ROBERTS, for plaintiff.

J. A. GILLIS, for defendant.

Devens, J.—The instructions, as given, were substantially those considered in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*, which were given at the second trial of that case. As the plaintiff there obtained a verdict, the inquiry there was whether they were sufficiently favorable to the defendant; but, as between the plaintiff and the defendant, we believe that they carefully guard the rights of each.

Though it is a part of the implied contract between master and servant (where there is only an implied contract), that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected (1).

1. *Minor employee injured by revolving knives of machinery.*—In *GILBERT v. GUILD AND ANOTHER*, 144 Mass. 601 (June, 1887), plaintiff's exceptions to verdict for defendants were *overruled*. Plaintiff was an employee in defendants' woolen mills and while working on a "shearing machine" his hand was drawn in by the moving cloth and a finger was cut off by the revolving knives of the machinery. At the time of the accident he was a little over nineteen years of age. The Supreme Court said: "The ground of the plaintiff's right of action was that he was injured in performing dangerous work that he was put to do by the defendants. The machine was dangerous

only because there was danger in working upon it; and, if it was in fact dangerous, it was immaterial that the danger might have been averted by appliances protecting against it. The defendants are not liable to the plaintiff because they used a dangerous machine, but because they employed the plaintiff to use it in ignorance of the danger. If the plaintiff undertook the work knowing the danger, the defendants are not liable although they might have prevented the danger by guarding against it; if the plaintiff did not know of the danger, proof that the defendants could not have guarded against it would be no defence. The verdict shows that the question whether the defendants were

In the present case the evidence of the plaintiff was that he went to work in the place pointed out by the defendants. He thus consented to the dangers attending the work, all of which were apparent; and, if he had sufficient knowledge and capacity to comprehend them, he can not now complain that

negligent in not having a guard upon the machine was not in the case. If it was founded upon the fact that the machine was not dangerous, or on the fact that the plaintiff had knowledge of the danger, it was equally immaterial that the defendants had not provided a guard. Want of due care by the plaintiff, or knowledge of the danger by him, which the jury must have found if they found the machine to be dangerous, would have prevented a recovery, equally whether the defendants could or could not have guarded against the danger. See *Ladd v. New Bedford Railroad*, 119 Mass. 412, 15 Am. Neg. Cas. 491, *ante* and cases cited; *Pingree v. Leyland*, 135 Mass. 398; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*; *Sullivan v. India Manuf. Co.*, 113 Mass. 396 (the case above reported); *Taylor v. Carew Manuf. Co.*, 140 Mass. 150; *Rock v. Indian Orchard Mills*, 142 Mass. 522 (see preceding paragraph); *Linch v. Sagamore Manuf. Co.*, 143 Mass. 206. The exceptions are to the exclusion of questions put to an expert. Three of the questions related to the use of a guard, an immaterial matter, and were properly excluded. The defendants were liable on account of the actual danger, and not from the fact that they might have prevented it." * * *

The case of *LINCH v. SAGAMORE MANUFACTURING CO.*, 143 Mass. 206 (January, 1887), referred to in the preceding paragraph, is stated in the syllabus to the official report as follows: "If a person who is employed as a fireman in a mill, where there are several boilers connected with a

main steam pipe by means of smaller pipes, each of which has a valve directly over the boiler, but no drip-cock, and whose duty it is to start the steam in the boilers in the morning, and who knows that it is dangerous to let on the steam when there is water in the pipes, is injured while letting on the steam, having the danger in mind, by the bursting of a valve in which there is no defect and the escaping of steam, it is an injury arising from the risks of his employment, and he cannot maintain an action against the millowner therefor." Opinion by C. ALLEN, J. Judgment on verdict directed for defendant.

See, also, the following case cited in *GILBERT v. GUILD*, *supra*:

In *PINGREE v. LEYLAND*, 135 Mass. 398 (September, 1883), tort for personal injuries received by plaintiff in using a winch on one of defendant's steamships for purpose of discharging cargo from said ship, defendant's exceptions to verdict rendered for plaintiff were sustained. It was held that plaintiff, who was in the employ of a stevedore discharging cargo from a steamship, could not maintain an action for injury sustained by a defective winch, where there was no evidence of a contract between the defendant (the owner of the steamship) and the stevedore, or that the stevedore was acting as the defendant's servant, or that the defendant undertook to furnish a suitable winch to be used in unloading the ship. It was also held that plaintiff's knowledge of the defect precluded recovery, as he assumed the risk of using the winch in its defective condition.

such place might, at moderate expense, have been made safer. The defendants were, therefore, properly entitled to the ruling that they were not bound in law to cover or fence the machinery, and could not be made liable merely for neglect so to do. The only ground upon which they could be held responsible was because they had been guilty of some negligence, thus failing in their duty to the plaintiff. The burden of proving this was upon him. Merely omitting to enclose the machinery could not be considered as such failure, the plaintiff having consented to work in the position in which he was exposed to the machinery in this condition. It was for him, therefore, to show some different or additional reason for holding them liable.

It may frequently happen that the dangers of a particular position for, or mode of doing work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them and to do his work safely, with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely without instructions or cautions which he did not receive.

The instructions given were in accordance with these views, and those requested could not have been given. The ruling requested, "that if no instruction was given the plaintiff as to the route in going to or from the machine at which he was injured except to do as the other boy before him did, and he did so and was injured, there was negligence on the part of the defendant," was erroneous, for it might have been that, although thus injured, he was injured by no negligence on the part of the defendants, but by negligence on his own part. The second instruction requested would have created the erroneous impression that, even if the plaintiff had full instructions, it would have been of no avail, if they proceeded from the defendants' foreman or second hand. The defendants, it is

true, can not escape the responsibility, if there was one upon them, of notifying the plaintiff of the risks of the work by merely delegating it to one of their servants; but if the duty thus delegated was performed, the plaintiff had all the notice requisite for his safety. The third instruction requested has already been considered. The mere failure of the defendants to guard their machinery was not a ground upon which the plaintiff could recover, and the fact that it was guarded in other rooms was immaterial.

Exceptions overruled.

MINOR EMPLOYEE INJURED WHILE OPERATING
HEMP MACHINE—FELLOW-SERVANT—INSTRUCTION.

— In **McGEE v. BOSTON CORDAGE COMPANY**, 139 Mass. 445 (June, 1885), minor employee, fifteen years old, injured while at work on a hemp machine, verdict returned for defendant was sustained and plaintiff's exceptions *overruled*. FIELD, J., delivered the opinion as follows: "The exceptions describe a machine of such a kind that the fact that it became clogged with the hemp was not necessarily evidence of negligence on the part of anybody. No evidence is recited in the exceptions that the machine was not a good one of its kind, and in good order up to the time when the 'hemp became entangled, and passed over the drum and adhered to the teeth underneath.' In the ordinary use of the machine, the heckle-pins would get out of order, and it does not appear that the pins were actually out of order when the plaintiff began work with the machine on the afternoon of the day of the accident, or at any time thereafter, until the hemp became entangled and was carried over the drum. The exceptions therefore fail to show that the instruction requested at the close of the charge was applicable to any evidence in the case. But, assuming that some instructions on the subject were necessary or appropriate, the instruction requested was too broad. While it was the duty of the defendant to furnish suitable machinery, and to keep it in proper repair, the making of such ordinary repairs as the use of the machine required to keep it in order from day to day may be entrusted to servants; and, if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty, and such servants are fellow-servants with those employed to use the machine. *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209 (1). The instruction given,

1. In *JOHNSON v. BOSTON TOW-BOAT COMPANY*, 135 Mass. 209 (June, 1883), where an employee was injured by the fall of a rail caused by the break-

ing of a rope used in hoisting rails on a vessel belonging to defendant, exceptions to verdict for plaintiff were *sustained*, on the ground of

as applied to the evidence, was substantially a correct statement of the law. Exceptions overruled."

The instruction referred to in the foregoing opinion in the *McGEE* case, is stated in the bill of exceptions as follows:

"At the close of the charge, the plaintiff requested the judge to instruct the jury, 'that persons charged with keeping the machinery in repair are not the fellow-workmen of the plaintiff, but are the agents of the defendant, charged with the execution of their duty to the plaintiff.' In answer to a question by the judge, the plaintiff's counsel stated that the only materiality of the request in this case was with reference to the teeth of the machine. The judge declined to give this instruction; and instructed the jury as follows: 'For the purposes of this case, the persons charged with keeping the machinery in repair, if the repairs that they are charged with are simply the replacing of the parts of the machine which may have got out of shape by use, if those repairs are to be made from time to time in a mill and when a machine is in place, would be the fellow-workmen of a person employed upon the machine, although, if the machine is so out of repair as to require the reconstruction of its parts, the rule is different, and, in that case, the persons whose duty it would be to see to such reconstruction would not be the fellow-servants of the person employed upon the machine, the risk of whose negligence the employee assumes in taking the employment.'"

fellow-servant, etc. The syllabus to the official report states the case as follows:

"If a servant is injured by the breaking of a rope used in hoisting goods, in consequence of the neglect of a fellow-servant, who knew of the defective condition of the rope, to supply a new one, in accordance with a duty which the master has imposed upon him, the question whether the fellow-servant acted as a fellow-servant merely, or as the representative of the master, is a question of law and not of fact.

"A corporation owning a lighter is

bound to use reasonable care in maintaining in suitable condition the appliances used on board the lighter by its servants in hoisting and lowering merchandise; but if it furnishes such appliances, and employs a competent servant to see that they are kept in proper condition, it is not liable for an injury occasioned to one servant by the parting of a rope, in consequence of its being used for too long a time, and after its defective condition was known to the servant whose duty it was to replace it." Opinion by W. ALLEN, J.

CIRIACK v. MERCHANTS' WOOLEN COMPANY.

Supreme Judicial Court, Massachusetts, February, 1890.

[Reported in 151 Mass. 152.]

MINOR EMPLOYEE CAUGHT IN GEARING OF MACHINERY — CLOTHING CAUGHT — INSTRUCTING EMPLOYEE AS TO DANGER — QUESTION FOR JURY.—Where a boy, twelve years of age, while working in defendant's mill, in a room filled with machines, the revolving gearing of which was in plain sight, was injured by the sleeve of his jacket being caught in the gearing and his arm drawn therein as he was hurrying between the machines to try to find a tool for the overseer of the room, and it appeared that the boy had less than the average intelligence of boys of his age, that he did not realize the danger of going between the machines nor had been warned of the danger, and that the place was dimly lighted, it was *held* that the case was properly submitted to the jury on the question as to duty of master to give warning of danger and as to plaintiff's exercise of due care, and judgment was rendered on the verdict for plaintiff (1).

TORT for personal injuries sustained by the plaintiff, on May 29, 1872, while in the defendant's employment. Writ dated June 16, 1885. At the trial in the Superior Court [Suffolk], before Blodgett, J., after the former decision,

1. On the former trial in the CIRIACK case, there was a verdict for plaintiff for \$8,000, which, however, was set aside by the Supreme Court and defendant's exceptions sustained, on the ground that there was not sufficient evidence to show negligence on defendant's part. See CIRIACK v. MERCHANT'S WOOLEN CO., 146 Mass. 182 (February, 1888).

The former decision in the Ciriack case, 146 Mass. 182, which is frequently cited and followed in Massachusetts cases on the questions of master's duty to instruct employees as to dangers of service, is as follows (the opinion being rendered by C. ALLEN, J.):

"In order to show negligence on the part of the defendant, the plaintiff relies on the omission to give him suitable instructions in reference to the dangers to which he would be

exposed in the course of his employment. His injury arose from coming in contact with the revolving cog wheels of a machine; and the instructions which he was entitled to receive must, therefore, have been concerning the danger from that cause. But it seems to us that it must fairly be assumed that the plaintiff had all such knowledge as it was the duty of the defendant to impart to him. There was no peculiar or secret source of danger. Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under

reported in 146 Mass. 182, there was evidence tending to prove the following facts:

"The accident to the plaintiff occurred in the finishing-room of the defendant's mill, a room filled with machines, including

these circumstances. Certainly the duty of the defendant did not extend so far as to require the giving of a special caution on every occasion when he might be called upon to pass near the machine. The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. A servant is held to take the risk of such dangers as are known and understood.

"In the present case, the duty of the defendant to the plaintiff would not require an explanation of anything which he already sufficiently understood. In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe. *Sullivan v. India Manufacturing Co.*, 113 Mass. 396, 15 Am. Neg. Cas. 527, *ante*. In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it. The accident happened in consequence of his omitting to guard against a known peril. He had been employed in the same room for a period of nearly two months. There is no reason to suppose that explicit instructions if given to him at the beginning of his employment, in reference to the danger of touching these wheels when in motion,

would have added anything to what he must fairly be presumed to have known at the time of the accident.

"It would be carrying the doctrine of holding employers to the duty of giving reasonable instructions to their servants quite too far, to require a special caution every time a boy is sent on an errand, under circumstances like those disclosed in the present case. The injury appears to have arisen from a lack of sufficient precaution on his part, and not from the negligence of the defendant. *Russell v. Tillotson*, 140 Mass. 201; *Williams v. Churchill*, 137 Mass. 243; *Wheeler v. Wason Manufacturing Co.*, 135 Mass. 294.

"In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 598, 15 Am. Neg. Cas. 506, *ante*, which is chiefly relied on by the plaintiff, the plaintiff had been at work for the defendant only one day, and under these circumstances the evidence of the nature of the work, and of the position in which he was to do it, were considered to warrant the jury in finding that the plaintiff was manifestly incapable of understanding and appreciating the dangers to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety.

"In the present case, we are of the opinion that there was no sufficient evidence of negligence on the part of the defendant."

See, also, the following cases in which the ruling in the *Ciriack* case, 146 Mass. 182, is followed:

Minor employee caught by machinery — Instructing employee.— In *Crowley v. Pacific Mills*, 148 Mass. 228 (January, 1889), tort, for personal

shears and gigs, the latter cylindrical machines for rubbing up the nap of the cloth. The gigs were about five feet high and square, and had upon one side gearing, in plain sight, consisting of three cog-wheels, each about eighteen inches in diameter, and one small cog-wheel about one and a half inches in diameter. The cylinder of each gig stood in an iron frame fastened to the floor by four legs, the bottom of the cylinder

injuries sustained by plaintiff, a boy seventeen years old, while in defendant's employ, plaintiff's exceptions to verdict directed for defendant were overruled, *C. ALLEN, J.*, stating the case as follows: "The plaintiff's injury was received, according to his own testimony, in consequence of his putting his finger in between the roll and the cylinder, in order to smooth the cloth just before it passed upon the cylinder, by taking out a 'double edge,' as it was called, that being a term applied to the turning over or under of the edge of the cloth. The plaintiff was seventeen years old, and had been at work for about six months upon a machine substantially like that upon which he received the injury, except that the distance between the roll and the cylinder was less than upon the latter machine; and he had been at work upon the latter machine nearly two weeks. The operation of the machine was simple. In view of the plaintiff's age and experience prior to the time of the accident, no duty then rested on the defendant to give him instruction in reference to the risk of possible injury. It could not be deemed necessary at that time to tell him that if he should put his hand in between the cloth and the revolving cylinder just at or just before the place where the cloth came in contact with the cylinder, there was danger that his hand would be caught. The omission to do this did not constitute negligence on the part of the defendant. *Goodnow v. Walpole Emery Mills*, 146 Mass.

261, 267; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182. Exceptions overruled."

Minor employee injured by machinery—Clothing catching on gearing.—In *PROBERT v. PHIPPS AND ANOTHER*, 149 Mass. 258 (May, 1889), minor employee, a boy fifteen years old, going between machines to stop one of them, injured by trousers catching in gearing which projected from a machine and his leg being drawn into gearing, verdict directed for defendants was sustained and plaintiffs' exceptions overruled. The Supreme Court said: "We think that it appears, from the testimony of the plaintiff himself, that the danger of getting caught in the gearing was obvious, and that he well understood what this danger was and how it was to be avoided, and that it was from his own want of care that he was injured. See *Sullivan v. India M'fg Co.*, 113 Mass. 396; *Rock v. Indian Orchard Mills*, 142 Mass. 522; *Gilbert v. Guild*, 144 Mass. 601; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182." * * *

Minor employee injured while cleaning machinery.—In *COULLARD v. TECUMSEH MILLS*, 151 Mass. 85 (February, 1890), tort for personal injuries to plaintiff, a minor, while in defendant's employment, defendant's exceptions to verdict rendered for plaintiff in the Superior Court, were sustained. The evidence showed the following facts. Plaintiff, who was between fifteen and sixteen years of age at the time of the accident, and

at its lowest point being about one and a half feet from the floor. Nothing obstructed the view underneath the cylinder except so far as the cylinder itself did so. The cylinder and the gearing, both of which revolved rapidly, moved always in the same direction. Two of these gigs stood together in the room, the distance between them at the narrowest point from

was of ordinary intelligence, had been at work for several months on machinery of various kinds. Two days and a half before he was injured he was set to work on a picker in defendants' cotton mill, without any instructions as to the manner of cleaning it. As the cotton passed through the picker, the seeds and dirt falling from it were caught upon an iron apron, hinged beneath one side to the machine and held in position by a weight. The machine was stopped each day for cleaning, which was done by inserting the hand through an opening on the front side of it, and taking hold of the unhinged end of the apron and pulling it down, so that the dirt might fall upon the floor and be taken away. Upon the hand being withdrawn, the apron would be brought back into position by the weight. It was a part of the plaintiff's duty to clean the machine, and he did so during the first two days he was at work upon it. On the third day he was attempting to clean it, and had inserted his hand through the opening and had pulled down the apron, when his hand slipped off the edge of the apron, and as he was withdrawing it, was caught between the apron and the upper edge of the opening and injured. The defendant requested a ruling that plaintiff was not entitled to recover, which request was refused and exception was taken. The Supreme Court (per HOLMES, J.), in its opinion, said: "The plaintiff had worked upon the machine two days and a half before the accident. He knew that the iron apron

which caught his fingers would spring back if pulled down and released. He knew its position relatively to the front opening, between the edge of which and the apron his fingers were caught. Knowing these facts, he knew that if he put his hand through the opening and let the flap spring up while it was there, it would get pinched. He also knew by experience the degree of force necessary to hold the apron down. We do not see what the defendant could have told the plaintiff that he did not know before, if he possessed the ordinary intelligence of boys of fifteen. *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Probert v. Phipps*, 149 Mass. 258. Exceptions sustained."

Minor employee injured by machinery.—In *PRATT v. PROUTY ET AL.*, 153 Mass. 333 (February, 1891), tort, for personal injuries sustained by plaintiff, a boy about sixteen years old, while in defendants' employ, defendants' exceptions to the refusal of the trial court (Bristol) to rule that the evidence was insufficient to warrant verdict for plaintiff, were sustained. The opinion rendered by W. ALLEN, J., states the case as follows:

"The only negligence of the defendants alleged in the declaration, and which could have been found by the jury under the instructions of the court, was setting the plaintiff to work upon a dangerous machine without proper instruction or caution. To show negligence in the defendants, it must appear that the danger was such that the plaintiff would not be

the cog of one gig to the belt wheel of the other being about one and a half feet, with a passageway between them and adjoining machines. The plaintiff was injured by being caught in the gearing at a point three and a half feet from the floor, where the small cog-wheel came in contact with one of the other cog-wheels. The plaintiff and other boys were employed

presumed to know it, and that the defendants did not give him information of it. If he knew and appreciated the danger, he cannot recover. It is enough to refer to *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India M'fg Co.*, 113 Mass. 396; *Rock v. Indian Orchard Mills*, 142 Mass. 522; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, and 151 Mass. 152, and *Coullard v. Tecumseh Mills*, 151 Mass. 85, in each of which cases the plaintiff was younger than the plaintiff in the case at bar.

"The machine was a skiving machine for shaving off one surface of bits of sole leather used in making the heels of boots. The leather is carried between two small, slowly revolving horizontal cylinders, and against a knife just back of the cylinders. The work of the plaintiff was to serve the pieces of leather to the cylinders, to be taken by them and drawn through between them and against the knife. The danger to be guarded against was that the fingers serving the pieces of leather to the cylinders would be caught between them and drawn through against the knife. This was an open and apparent, and not a hidden danger. Not only were the cylinders and their movements plain to see, but their operation and effect in drawing in against the knife whatever came between them, were obvious, and were constantly demonstrated in their use. That the plaintiff was a boy of at least ordinary intelligence is manifest, and is not denied; and if he could fail to see and appreciate the

danger, all the information and caution that was needed was given to him by the defendants, and his own evidence shows that he knew and understood the danger." * * *

Minor employee slipping on floor and injured by machinery.—In *TINKHAM v. SAWYER AND ANOTHER*, 153 Mass. 485 (April, 1891), verdict for defendants was sustained, the opinion by MORTON, J., stating the case as follows: "We are unable to discover in this case any ground on which it can be held that the defendants are liable. The plaintiff was at the time of the accident somewhat over sixteen years of age, and of at least ordinary intelligence, and had been in the employ of the defendants about a month. Up to the forenoon of the day before the accident, he had been attending to cards in the carding room of the defendants' mill. He was then set to work to help tend the machine on which he was injured, the accident occurring about the middle of the forenoon of the next day. He was told by the man who set him to work on it that the machine was a dangerous one, and not to touch it when in motion. This was repeated to him by the man who was running the machine. He himself testified that he knew the machine was dangerous when it was going, and that it was going at the time of the accident. During the day and more that he worked on the machine, he helped clean it a number of times, and had, therefore, the knowledge thus acquired in addition to the warning and instruction which he had received.

in the finishing-room, and his duty, as instructed by them, was to take cloth from an apron on the back of the finishing shears and wheel it on tracks through one of the passageways to another room, called the gig-room; also to take cloth from racks and wheel it to the shears and fasten it upon the apron. These racks were small flat platforms about four inches from the floor, and stood directly in front and within six inches

He had to sprinkle the wool with oil before it was put into the machine, and this made the floor very slippery, so that, as he testified, he had to walk carefully. It was a part of his duty to gather up the wool from the floor as it was blown out of the machine, and put it back, so that it would go through the machine again. The opening out of which the wool came was about two feet from the floor, and was four feet horizontally by one foot in height. Two or three inches inside of it was a large revolving cylinder with teeth in it. At the time of the accident, he was gathering up wool from the floor so near to the machine, as he testified, that if he slipped he would go into it. He did slip, and his arm went into the opening, and the injury complained of resulted. Upon these facts, it is clear that the defendants were not negligent in failing to warn or instruct him as to the danger. It is difficult to see what they could have told him that he reasonably might not be expected to know. It is plain, also, that the plaintiff understood and appreciated the risks of the employment in which he was engaged, and that the injury, if not due to one of those accidents for which nobody can be said to be to blame, happened from his own want of care in placing himself so near the machine that, if he slipped, there was danger that his arm or some portion of his body would go into it. The defendants were not bound to cover the opening, even if the process which the ma-

chine performed would have admitted of it. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Probert v. Phipps*, 149 Mass. 258; *Coullard v. Tecumseh Mills*, 151 Mass. 85. Verdict to stand."

Minor employee injured by arm being caught in machine.—In *McGUERTY v. HALE*, 161 Mass. 51 (March, 1894), minor employee, a boy eighteen years old, injured by his arm being caught in a machine upon which he was working, verdict for defendant was sustained and plaintiff's exceptions *overruled*. The Supreme Court said: "The exceptions recite that 'the plaintiff offered to prove that Edwards, about six years after the accident to the plaintiff, told the defendant that the safety of the workmen required that the gearing upon the machine in question should be covered, and that it was then covered by the defendant; but this evidence was excluded.' This ruling should be considered in connection with the instruction to the jury that 'the defendant was not bound in law to cover it (the gearing), and could not be made liable merely for neglecting so to do.' The gearing was in plain sight, as the plaintiff testified. The ruling and instruction were correct upon the facts in evidence. *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168; *Downey v. Sawyer*, 157 Mass. 418; *Sullivan v. India Manuf. Co.*, 113 Mass. 396; *Gilbert v. Guild*, 144 Mass. 601; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182." * * *

of the two gigs, but were not connected with them. The plaintiff's duties did not require him to go between the machines, or to have anything to do with the gigs for the purpose of oiling them or otherwise, his only duty being to take care of the cloth. The regular way to the gig-room was through the passageway above mentioned, but there was room for a man to pass with care between the gigs when they were running, and some of the men and boys occasionally went to and from the gig-room in that way, but the space was not designed or intended for a passageway. One Craven was the overseer of the finishing-room when the plaintiff began to work there, but just before the accident one Miller was made overseer in his place.

"The plaintiff testified that he was born on February 12, 1860; that he went to work in the finishing-room in April, 1872; that he had worked for a while previously in the flock-room, a room adjoining the finishing-room, his only duty being to shovel flocks into a flocking-machine and to carry away the cloth when flocked; that Craven told him when he began work to do what the other boys told him to do; that with the other boys he wheeled cloth from the racks to the shears, and thence when sheared into the gig-room; that he had nothing to do with the gigs, and did not think that he came within two feet of them in doing his work; that after he had worked in the finishing-room about six weeks, on the morning of the accident, as he was returning from wheeling some cloth into the gig-room and was proceeding along the passageway, Miller spoke to him sharply, and told him to get a punch that had been left between the two gigs where Miller had been mending a machine, and then told him to hurry up about it; that he thereupon left his work, and in going to the place where he was told to go he hurried as fast as he could, and went in between the gigs; that he had never done or helped to do anything on a gig, and had no recollection of having previously gone between them, and did not know or believe that he ever looked at or examined these machines; that when between the gigs he began to look for the punch, and, as he could not see anything while he was standing up, he stooped down to see if he could find it; that as he raised himself up the sleeve of his jacket was caught in the gearing and his arm was drawn in and injured; that he did not know until afterwards by what he had been caught; that when he

went between the machines and searched for the punch he did not realize that there was any danger; that before and after going into the mill he had not received or been given any instructions with reference to the danger of the machinery or of the gearing, and had no knowledge of the danger of either; that he had no recollection of noticing that the machinery in the gig-room or finishing-room was in operation; and that the only knowledge he had that they were running was from being caught.

"The plaintiff introduced numerous witnesses, who testified that the plaintiff was at the time of the accident a boy of less than the average intelligence of boys of his age; but this was contradicted by various witnesses of the defendant. There was also evidence tending to show that the place where the injury occurred was dimly lighted. The jury took a view of the place.

"The judge refused to rule, as requested by the defendant, that, upon all the facts, the jury would not be justified in returning a verdict for the plaintiff; and submitted the case to the jury, with instructions not otherwise excepted to.

"The jury returned a verdict for the plaintiff in the sum of \$5,000; and the defendant alleged exceptions." *Judgment on verdict.*

R. M. MORSE, JR., and H. G. NICHOLS, for defendant.

H. W. BRAGG and E. GREENHOOD, for plaintiff.

Knowlton, J.—This case has once before been considered by this court (see 146 Mass. 182), and on the testimony then presented it was not easy to determine, as it is not now, upon slightly different testimony, whether there was any evidence of negligence on the part of the defendant. The only negligence alleged is the failure to warn the plaintiff of the dangers to which he was subjected in doing his work.

An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed thoroughly to understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his and not his master's. But where the work of a servant exposes him to danger of which he is ignorant, and which,

from youth or inexperience, he is manifestly incapable of comprehending without assistance, it is the duty of his master, if he knows or ought to know of it, to give him such warning and instruction as are necessary for his safety. In determining the master's duty in such a case, the inquiry is, What instruction does the servant appear to need? Is there reason to believe him ignorant of anything which, for his protection, he ought to know, or incapable of appreciating the risks from what he sees around him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age and apparently of average intelligence, an employer is not called upon to tell him that, if he holds his hand in fire, it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of revolving cog-wheels in the gearing of a mill, it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses.

There is nothing in this case to warrant a jury in finding the defendant negligent in omitting to tell the plaintiff that there were cog-wheels on the gig, or that the machinery would injure him if he allowed his hand or arm to get into the gearing, or in failing to repeat a warning which had once been given, or to inform him of risks which he understood himself. *Williams v. Churchill*, 137 Mass. 243; *Russell v. Tillotson*, 140 Mass. 201; *Crowley v. Pacific Mills*, 148 Mass. 228; *Buckley v. Gutta Percha & Rubber Manuf. Co.*, 113 N. Y. 540. But the case presents itself in an aspect somewhat different from that which it wore at the former hearing. Besides some difference in the details of the testimony at the last trial, evidence was introduced from numerous witnesses, which, though contradicted, would warrant a jury in finding that the plaintiff was a boy of less than the average intelligence of boys of his age, and that the defendant knew it, or from his appearance ought to have known it, before the accident. There was additional evidence that the place where he was injured was dimly lighted. The undisputed testimony at the former trial tended to show that he possessed at least the intelligence usual in boys of

his age, and that fact was referred to in the opinion as one of the grounds of the decision.

It now appears that, while he had worked for a considerable time in the room where the gearing was plainly visible, so that he was undoubtedly familiar with it in a general way, he had never worked so near it as to have occasion specially to consider the risk of getting his clothing caught in it, or the danger of being drawn into it and seriously injured, if some loose part of one of his garments should come in contact with it. There was evidence that a sleeve of his jacket was caught, and that his arm was thus drawn between the wheels. It seems to have been his duty to obey the overseer, who, as he testifies, told him to pick up the punch. The work took him to a place where he had never had occasion to work before; the order was imperative, calling for haste. He had had no instruction, and it is not clear that he had had any observation or experience which showed the danger that, in getting down and looking under the machine and getting up again, some part of his clothing might come in contact with the gearing and be caught, and draw his hand or arm between the wheels.

On the whole, we are of opinion that there was some evidence to submit to the jury on the question whether the plaintiff was not obviously in need of information as to this risk. On similar grounds, the plaintiff was allowed to go to the jury, and receive a verdict, in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *anth.* See, also, *Wheeler v. Wason Manuf. Co.*, 135 Mass. 294; *Glover v. Dwight Manuf. Co.*, 148 Mass. 22; *Swoboda v. Ward*, 40 Mich. 420; *Huizega v. Cutlet & Savidge Lumber Co.*, 51 Mich. 272; *Dowling v. Allen*, 74 Mo. 13.

There was evidence for the jury upon the question whether the plaintiff was in the exercise of due care.

Judgment on the verdict.

NOTES OF MASSACHUSETTS CASES RELATING TO INJURIES TO MINOR EMPLOYEES.

Among the numerous Massachusetts cases relating to injuries sustained by minor employees, not covered in other parts of this volume of AM. NEG. CAS., are the following:

Minor employee injured by machinery — Instructing employee.

In *LEISTRITZ v. AMERICAN ZYLONITE Co.*, 154 Mass. 382 (September, 1891), plaintiff's exceptions on verdict directed for defendant in the Berk-

shire Superior Court were *overruled*, the syllabus to the official report stating the case as follows:

"In an action for personal injuries sustained by a boy, between eighteen and nineteen years old, in the defendant's mill, the plaintiff, after testifying that he told the foreman immediately after the accident that it was caused by a machine at which he was set to work by the sub-foreman, cannot be permitted to testify that the foreman then said to the plaintiff that it was just like the sub-foreman to set him at work at a dangerous machine he did not know anything about.

"In an action for personal injuries by a boy between eighteen and nineteen years old, after a long examination of the plaintiff as a witness in the presence of a jury, questions to other witnesses, as to whether the plaintiff was above or below the average intelligence of a boy of his age, were held to be properly excluded.

"An employer can not be held liable for his failure to instruct an employee respecting dangerous work which he is not expected to do."

Minor employee injured while feeding cotton machine.

In *DE SOUZA v. STAFFORD MILLS*, 155 Mass. 476 (February, 1892), defendant's exceptions to verdict for plaintiff were sustained and new trial granted. The syllabus to the official report states the case as follows: "A boy, nineteen years of age, of average intelligence and capacity, but unable to speak the English language, was employed in a cotton mill, and his duty was to feed cotton between two steel rollers in plain sight, immediately behind which revolved, under cover of an iron box, an iron frame called a beater, at the rate of 1,200 revolutions a minute. The cotton clogged the rollers and he inserted his hand between them to remove it, whereupon his hand was rolled in and a part of it cut off. He knew that when the cotton was removed the rollers were likely to start up, and, though he had not seen the beater in motion, he had seen it at rest and knew it revolved in close proximity to the rollers. It was no part of his duty to clean the rollers when they became clogged. *Held*, that he could not recover of his employer for his injuries."

Minor employee, a girl, injured by skiving machine.

In *CONNORS v. GRILLEY*, 155 Mass. 575 (February, 1892), tort, for personal injuries sustained by plaintiff, a girl seventeen years old, while at work on a skiving machine in defendant's factory, judgment was rendered on the verdict for plaintiff, *ALLEN, J.*, stating the case as follows: "We do not see that the judge would have been warranted in withdrawing the case from the jury. Looking only at the testimony in support of the plaintiff's claim, it might be found that she was in the exercise of due care. According to the testimony which the jury might believe, she was seventeen years old, inexperienced, having worked on a skiving machine only one afternoon before the day when she got hurt. The defendant set her at work upon the machine without instructions. She undertook to do as Miss Simmons had done. There was a rule that if leather got caught Heckman should be called. It did get stuck, and she called him, and he came and relieved the machine. A few minutes afterwards it got stuck again, and she called him, and he came and relieved the machine, and swore at her, and told her, "If this machine gets stuck again, fix it yourself."

This was within the defendant's hearing. She was going to ask a few questions of the defendant, but he shook his head and hands, and refused to listen, and said: "No, no, no; if you do not work fast, I will send you home." So he frightened her and she worked faster, and when the machine got stuck again she tried to relieve it as she had seen Miss Simmons and Heckman do, and her hand got caught. It was not very unusual for the machine to get stopped by leather catching it." * * *

Minor employee injured by lap-winder machine.

In *PATNODE v. WARREN COTTON MILLS*, 157 Mass. 283 (October, 1892), action at common law for injury to plaintiff, a boy fourteen years old, while in defendant's employ, caused by his hand being crushed between the rolls of a lap-winder, then in use for doubling laps, verdict for plaintiff was sustained and defendant's exceptions overruled. Opinion by BARKER, J.

Minor employee injured by carding machine.

In *DOWNEY v. SAWYER AND ANOTHER*, 157 Mass. 418 (December, 1892), tort, for personal injuries sustained by plaintiff, a boy of sixteen years of age, caused by a carding machine, while working in defendant's wool-carding room, verdict directed for defendant was sustained, and plaintiff's exceptions overruled. Opinion by BARKER, J.

Minor employee caught by gearing of spinning machine — Knowledge of danger.

In *CHENEY v. MIDDLESEX COMPANY*, 161 Mass. 296 (May, 1894), minor employee, eighteen years of age, injured by his hand being caught in the gearing of a spinning machine, called a mule, while he was passing through an alley-way, plaintiff's exceptions on verdict rendered for defendant were overruled. There did not appear to be any occasion for plaintiff to go into the alley-way. Plaintiff was aware of the danger and defendant was not bound to instruct him as to same.

Minor employee injured by punching machine — Instructing employee — Question for jury.

In *ARMSTRONG v. FORG*, 162 Mass. 544 (January, 1895), verdict for plaintiff, a minor employee of defendant, was sustained, the opinion by KNOWLTON, J., stating the case as follows: "The plaintiff's finger was hurt in using a steam-power punching machine. The question before us is whether there was any evidence to warrant the submission of the case to the jury. At the time of the accident the plaintiff was between fourteen and fifteen years of age. He was set at work on the machine in the afternoon and was hurt in the morning of the next day. The power was applied to the machine by placing the foot on a treadle, which would cause the press to come down with great force upon a piece of steel which was placed on a die, and which would be punched and bent into the desired shape by the operation. The treadle was so adjusted that, if the foot was placed on the treadle and immediately taken off, the press would come down once and go up and stop, but if the foot was kept on the treadle it would keep coming down and going up continuously. There was contradiction in the testimony in regard to the instructions given to the plaintiff, but if the jury believed him they were warranted in finding that he was not told, and did not know, that if he kept his foot on the treadle the press would keep coming down and going up, and that he was not told how to take the piece

of steel out of the press after it was punched, but saw the person who set him at work do it with his fingers. He testified that after he had been working about two hours the piece of steel kept sticking to the punch, that he told the engineer, who came and sat down at the machine and tried it, and that afterwards, when the plaintiff was using his finger to get the piece of steel out, the press came down and caught the finger. The jury, if they believed the plaintiff, might well find that there was negligence on the part of the defendant in not telling him how to avoid danger in the use of the machine. We are of opinion that it was also a question of fact for the jury whether the plaintiff, in view of his youth and inexperience, was in the exercise of due care. Exceptions (of defendant) overruled."

Minor employee injured by circular saw — Instructing employee — Question for jury.

In *HANSON v. LUDLOW MANUFACTURING CO.*, 162 Mass. 187 (October, 1894), minor employee, seventeen years old, injured while operating a circular saw, plaintiff's exceptions to direction of verdict for defendant were *sustained*, it being held that it was a question for the jury whether defendant ought to have warned plaintiff of the danger. The Supreme Court (per BARKER, J.) said:

"The particular danger of which the plaintiff contends that he should have been warned arose from the fact that objects which come in contact with the rear of a circular saw when it is in operation may be suddenly and forcibly thrown upward and forward. The saw teeth, which at a given instant are just above the table at the back of the saw, have a rapid upward and forward motion, which tends to carry with them objects which they touch, and such objects may be so thrown as to fall upon the front of the saw. The plaintiff was sawing boxwood logs into blocks about one inch and a quarter thick, and some of the logs were so large that the saw would not entirely sever them. These he took from the table by moving them transversely upon it behind the saw, until he could bring them forward, when, with a hatchet, he detached the partially severed block. A log which he was thus manipulating behind the saw touched it, and was thrown suddenly forward, carrying the plaintiff's hand, which fell upon the saw and was hurt.

"While there may have been other and, perhaps, safer ways of doing his work, the evidence tended to show that he had but little experience in cutting the blocks, and also that this method was approved by his foreman, and we cannot, as matter of law, say that in using it the plaintiff was not in the exercise of due care." * * *

Minor employee injured by circular saw.

In *WILSON v. STEEL EDGE STAMPING AND REFINING CO.*, 163 Mass. 315 (March, 1895), minor employee injured while operating circular saw, judgment was rendered on verdict directed for defendant, on the ground that the danger was obvious to plaintiff.

Minor employee, a girl, injured while cleaning machinery — Contributory negligence.

In *GARDNER v. COHANNET MILLS*, 165 Mass. 507 (April, 1896), two actions of tort, one for personal injuries to plaintiff, a minor, while in defendant's

employ, and the other by her father for loss of her services, etc., verdict in each case being directed for defendant, plaintiff's exceptions were overruled. BARKER, J., rendered the following opinion: "In order to do her work in cleaning the running gear of a mule carriage, as she testified, she was taught to do it, the minor plaintiff had to kneel upon the floor, facing a long box which slowly moved upon wheels back and forth in front of her, for a distance of five feet and an inch, with a short stop between each movement. The box had the same movements on each trip, and each whole trip out and back occupied about fifteen seconds. Upon every trip the box came toward her at the same rate of motion, and stopped in the same place. The only danger to which her position exposed her was that of being struck by the box, if she placed her head where the box would come. It follows from her own testimony that she had taken the position which she must take to do the work safely many times in each of the six weeks she had been at work. Besides this, the box had made its uniform trips and stoppages many thousands of times while she was at work supplying roving to the machine, and so placed that the movements of the box were open to her observation. She was an intelligent child, fourteen years and eight months of age. She admitted that she knew how fast the box moved, and how far it came, and it was conceded that the machine was in good order and the place well lighted. There was no contention that any unusual circumstance occurred to confuse her, or to distract her attention, nor that there was not ample room for her to take a safe place in which to do the work, nor that the place where she knelt was not of her own free selection. As she was kneeling, facing the approaching box, and awaiting its coming, she was struck by it upon her forehead. We think it a matter of law that in allowing herself to be so struck she was negligent and that the verdicts for the defendant were rightly ordered. Exceptions overruled."

Minor employee, a girl, injured while cleaning machinery.

In DONAHUE v. DROWN, 154 Mass. 21 (May, 1891), tort, for personal injuries to plaintiff, a girl twenty years old, who, while cleaning a machine in defendant's candy factory, was injured by the machine being set in motion, her hand and arm being caught thereby, defendant's exceptions to verdict returned for plaintiff were overruled.

Minor employee injured while adjusting pulley — Dangerous place.

In LAPLANTE v. WARREN COTTON MILLS, 165 Mass. 487 (March, 1896), minor employee, fourteen years old, injured while trying to replace a belt on a pulley in defendant's mill, verdict for plaintiff was sustained, the question whether plaintiff was put to work in a dangerous place, without proper instruction, being for the jury.

Minor employee, a girl, injured by flying substance.

In FLAHERTY v. POWERS, 167 Mass. 61 (October, 1896), tort, for personal injuries occasioned to plaintiff, who was seventeen years old, by the spattering of a mixture of gum and caustic soda into her eye while operating, in defendant's employ, a machine used in making envelopes, verdict for plaintiff in the Hampden Superior Court was sustained, and defendant's exceptions overruled.

Minor employee scalded by caustic soda in bleaching tank — Negligence of fellow-servant.

IN *SIDDALL v. PACIFIC MILLS*, 162 Mass. 378 (November, 1894), minor employee, thirteen years of age, injured by being scalded and burned by a solution of caustic soda in the bleaching tank in defendant's mill, judgment was rendered on the verdict directed for defendant, the injury being caused by the negligence of a fellow-servant. It appeared that plaintiff was directed by defendant's second hand to work upon the bleaching tank under the charge of one Elliott, who would show plaintiff what to do. "Under Elliott's direction, the plaintiff went into one of the tanks and spread the pieces of burlap over the cloth which had previously been packed in the tank by another boy. It took the plaintiff from ten to fifteen minutes to do this work, and when it was done he went back to the other part of the room and resumed his regular work. He was called by Elliott two or three times during the rest of the afternoon to do the same thing in the bleaching tanks. On the morning of July 8 he was again called by Elliott, and directed to go into one of the bleaching tanks and spread the burlaps over the mass of cloth. It was dark inside of the tank, but it was not so dark but that the plaintiff could see to do the work of spreading the burlaps over the cloth as some light came in through the man-holes. The cloth had been packed by another boy, and in the mass of cloth there was a depression three or four inches deep, caused by that boy in standing on the cloth while doing his work. As the plaintiff was on his hands and knees on top of the cloth in the tank and reaching out in the darkness, spreading the burlap, he put one of his hands into the depression, which he was unable to see, and, losing his balance, fell over on his side into a pool of the caustic soda solution, which had been negligently turned on to the bleaching tank by Elliott, and which had oozed up through the cloth and filled the depression, and was severely scalded and burned by the solution. Elliott, who was called as a witness for the plaintiff, testified that he turned on the caustic soda solution either before or after he sent the plaintiff into the tank, and that he did it through a mistake. The plaintiff was entirely ignorant of the process that was carried on in the bleaching tanks, did not know that a solution of caustic soda was used in them, did not know the caustic soda would burn, was never cautioned, warned, or instructed by anybody, and did not know or learn from any source that the work in the bleaching tanks was dangerous. Elliott had been told several times by the overseer of the room never to turn on the caustic soda solution in the bleaching tanks until after the boys had finished their work in them; but the overseer had never made any particular observation to see whether his instruction in this respect was complied with by Elliott." * * *

The opinion by the Supreme Court (per KNOWLTON, J.) was as follows:

"The direct and proximate cause of the injury from which the plaintiff suffered was the negligence of a fellow-servant. It was negligence of such a kind that no instruction which the defendant could have given the plaintiff in regard to the method of doing his work would have been likely materially to diminish the risk of injury from it. The risk of injury from negligence of his fellow-servants is one which an employee assumes by virtue of his contract to engage in the service, even though neither he nor

his employee can foresee the dangers which may result from such negligence. Ordinarily the employer is not called upon to instruct a young and inexperienced person in regard to dangers which can only result from the negligence of fellow-servants. It is not to be presumed that others will neglect their duties, and a boy cannot expect to be instructed as to what to do in a situation which is not to be expected in the ordinary course of the business, and which can only exist through the fault of another. But if we assume in favor of the plaintiff, without deciding, that the risk of particular dangers from this cause may sometimes be so great and so obvious to the employer that he ought to give an inexperienced boy warning and instruction in regard to them, he is called upon so to do only when he himself ought reasonably to anticipate them, and when his instruction would be likely materially to diminish the danger to his employee. In the present case there is no evidence to warrant a finding that he owed the plaintiff such a duty. The danger of such an injury was very remote and improbable. It could only come from negligence which the employer had no reason to expect. Moreover, nothing which the plaintiff could have done consistently with the expeditious transaction of the work could have relieved him from the possibility of such an accident. The solution of caustic soda might be turned on after he had entered the tank through the man-hole, as well as before, and he would have no means of knowing it. In the present case, Elliott, who was called by the plaintiff, testified that he turned it on either after or before, without professing to know more definitely. We are of opinion that there was no evidence on which the jury could have found that the accident resulted from failure of the defendant to perform any duty which it owed to the plaintiff. Judgment on the verdict."

Minor employee injured while running freight elevator — Obvious danger.

In *ROOD v. LAWRENCE MANUFACTURING CO.*, 155 Mass. 590 (February, 1892), tort, for personal injuries sustained by plaintiff, a boy nineteen years old, while in defendant's employ, and engaged in running a freight elevator in defendant's mill, defendant's exceptions on verdict returned for plaintiff were sustained. The Supreme Court said: "A boy, nineteen years old, of ordinary intelligence, must, we think, understand the danger of keeping hold of a shipper rod, which is outside of the elevator well, until the cross-beam of the elevator on which he is standing catches his hand or arm between it and the edge of the floor through which the elevator is descending. This is a danger which we think he would understand and appreciate as thoroughly as an older person. We see no sufficient evidence of a want of due care on the part of the defendant, or of due care on the part of the plaintiff."

Boy coming into contact with saw — Assisting workmen — Licensee — Volunteer.

In *SHEA v. GURNEY AND ANOTHER*, 163 Mass. 184 (March, 1895), where a boy, fourteen years old, while on defendant's premises assisting one of defendant's servants, was injured while engaged in taking pieces of wood from a saw as they were cut, and throwing them to the floor, or into a wagon standing at the door, the injury being caused by his coming in contact with the saw, verdict directed for defendants was *sustained*. The Supreme Court (per MORTON, J.) said:

"The plaintiff was not in the employ of the defendants. He was not induced or invited by them to enter their premises. He did not go there upon any matter of mutual interest to him or them, or upon any matter of business. He went there solely for his own amusement. At different times before the accident he had assisted workmen, including the one whom he was helping when the injury occurred under such circumstances that the jury would have been warranted in finding that he was doing it with the knowledge of one or both of the defendants. Once or twice, as the testimony tended to show, when about the premises, he had been directed by Slack to load some boxes. And in the same afternoon, shortly before the accident happened, the testimony tended to show that Slack saw the plaintiff helping to load slabs into a wagon to be taken to the saw-house.

"But as between the plaintiff and the defendants, notwithstanding these circumstances, he was at the most only a licensee and volunteer visiting the premises to amuse himself by riding in the teams and by assisting the men. And as such the defendants owed him no duty except to abstain from injuring him by active misconduct on their part. *Zoebisich v. Tarbell*, 10 Allen, 385, 386; *Severy v. Nickerson*, 120 Mass. 306; *Johnston v. Boston & Maine Railroad*, 125 Mass. 75; *Galligan v. Metacomet Manuf. Co.*, 143 Mass. 527; *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66; *Reardon v. Thompson*, 149 Mass. 267; *Daniels v. New York & New England Railroad*, 154 Mass. 349; *Billows v. Moors*, 162 Mass. 42.

"We do not mean to intimate that the plaintiff was in the exercise of due care, even if he were to be regarded as the servant of the defendants.

"The direction by the workman, Arsenal, does not help the plaintiff. *Flower v. Penn. R. R. Co.*, 69 Pa. St. 210; *New Orleans, Jackson & G. N. R. R. Co. v. Harrison*, 48 Miss. 112; *Howard v. Hood*, 155 Mass. 391. Exceptions overruled."

RYALLS v. MECHANICS MILLS.

Supreme Judicial Court, Massachusetts, November, 1889.

[Reported in 150 Mass. 190.]

EMPLOYERS' LIABILITY ACT—RIGHT OF ACTION—STATUTE—COMMON LAW—STATUTORY CONSTRUCTION.—

The statute of 1887, c. 270, section 1, clause 1, commonly called the Employers' Liability Act, which gives to an employee a right of action for an injury (he being at the time in the exercise of due care) caused "by reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer * * * owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition," does not bar the common-law remedy of the employee, as he still has a

right to sue under the same conditions, and to recover damages to the same extent as if the statute had not been passed (1).

NOTICE OF INJURY—STATUTE.—The notice of injury required to be given under the statute of 1887, c. 270, section 3, as a condition to maintaining actions "under this Act" (statute 1887, c. 270, section 1, clause 1) applies only to those cases, if any, lying outside the common-law rule, but embraced with the clause of that Act, unless a plaintiff, having a remedy at common law, insists on relying upon the statute alone.

The case is stated in the opinion. *Judgment for plaintiff.*

J. W. CUMMINGS, for plaintiff.

J. M. MORTON, for defendant.

Holmes, J.—This is an action for personal injuries caused to an employee by a defect in the condition of the machinery used in the business of her employer. The declaration is framed without reference to the Employers' Liability Act (Statute 1887, c. 270), and the plaintiff has had a verdict. We must take it, therefore, that the defect was of such a kind that the defendant would have been liable under our decisions unless the above statute has cut down the plaintiff's common-law rights. The question raised by the report is, whether since that statute an employee's right of action in cases like this is wholly statutory, and whether the plaintiff is barred because she did not give the notice of the time, place, and cause of the injury without which, by section 3, no action for the recovery of compensation for injury under that Act shall be maintained. It will be seen on reading the two statutes that ours is copied verbatim, with some variations of detail, from the English statute (43 & 44 Vict. c. 42). Therefore it is proper, if not necessary, to begin by considering how the

1. The opinion by Mr. Justice Holmes, in the case at bar, discusses fully the employee's right of action at common law and under the Employers' Liability Act, and also compares the English statute with that of Massachusetts. The learned judge, in construing the statute cites numerous Massachusetts and English authorities which will be found reported or noted in this volume of *AM. NEG. CAS.*

For complete copies of the Massachusetts statute (Employers' Liability

Act of 1887), with amendments up to 1902, and the several English statutes, see 13 *AM. NEG. CAS.* 857-874, wherein are also set forth similar statutes of other States.

Following the case at bar are numerous reports, notes and abstracts of Massachusetts cases under the Employers' Liability Act. See, also, notes and abstracts of statutory actions brought by railroad employees, pages 457 to 475, in this volume of *AM. NEG. CAS.*, *ante*. See, also, pages 446 to 450, *ante*.

English Act had been construed before our statute was enacted. *Comm. v. Hartnett*, 3 Gray, 450; *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 227. Looking first at its general scope, it was plain that it did not attempt to codify the whole law as to the liability of employers. *Roberts & Wallace, Employers' Liability* (3rd ed.), 208. It was regarded as an act passed in favor of workmen. *Gibbs v. G. W. R'y*, 12 Q. B. Div. 208, 211. See *Walsh v. Whiteley*, 21 Q. B. Div. 371, 380. It was held to be intended only to remove certain bars to their right to sue for personal injuries based on their relation to their employer. *Griffiths v. Dudley*, 9 Q. B. Div. 357; *Weblin v. Ballard*, 17 Q. B. Div. 122, 125; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692; *McAvoy v. Young's Paraffin Co.*, 9 Ct. of Sess. Cas. (4th series) 100, 103; *Morrison v. Baird*, 10 Ct. of Sess. Cas. (4th series) 271, 277; *Robertson v. Russell*, 12 Ct. of Sess. Cas. (4th series) 634, 638. But these bars were removed only in the cases specified in the Act; *Griffiths v. Dudley*, 9 Q. B. Div. 357, 362; *Gibbs v. G. W. R'y*, 12 Q. B. Div. 208; *Roberts & Wallace, Employers' Liability* (3rd ed.), 241, 242; and defenses not based upon the relation of master and servant were left unaffected, although not mentioned; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

In agreement with these views, and also with the fact the qualifications of sections 1 and 2, the limit of compensation set by section 3, the requirement of notice and limitation of time for suing in section 4, and the direction as to the court where the action shall be brought in section 6, are all confined to proceedings "under this Act," the text-books argued and affirmed that the workman's common-law rights remained unimpaired. *Roberts & Wallace, Employers' Liability* (3rd ed.), 207-209, 331; *Fraser, Master & Servant* (3rd ed.), 172; *Spens & Younger, Employer and Employed*, 130, 131; *Macdonnell, Master & Servant*, 659, 660. The practice of proceeding under the statute and at common law in the same action seems to have been settled in Scotland; *McDonagh v. MacLellan*, 13 Ct. of Sess. Cas. (4th series), 1000, 1003; *Morrison v. Baird*, 10 Ct. of Sess. Cas. (4th series), 271; *Roberts & Wallace, Employers' Liability* (3rd ed.), 209; and the intelligible doubts which may have been felt as to the reasoning in *Morrison v. Baird*, *supra*, touching the right to remove the whole action to the Court of Sessions under section 6 (*Spens &*

Younger, Employer and Employed, 173), did not affect the continued existence of common-law rights. We shall add one or two references more specifically applying to this case after we have stated the substance of section 1.

By section 1 of the English Act, when "personal injury is caused to a workman, 1, by reason of any defect in the condition of the * * * machinery * * * used in the business of the employer * * * the workman * * * shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." This right, it will be seen, is given by this section without qualification. But then section 2 goes on to say that he shall not be entitled, "under this Act," to any right of compensation or remedy against the employer, under section 1, clause 1, "unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the * * * machinery * * * [was] in proper condition."

Standing in this form, it was tolerably clear that section 1, clause 1, was not intended, in connection with section 2, to codify as well as to enlarge a rule of the common law, and to make all actions by workmen for defects in machinery statutory, but that, like the other clauses of section 1, it purported at most only to do away with the defenses that the workman impliedly took upon himself the ordinary manifest risks of his employment (*Weblin v. Ballard*, 17 Q. B. Div. 122; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Yarmouth v. France*, 19 Q. B. Div. 647, 654, 667); or that the defect was due to the negligence of the person intrusted by the master with the supervision of the machinery, and that he was the plaintiff's fellow-servant, the ground on which the defendant escaped in *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Griffiths v. Dudley*, 9 Q. B. Div. 357; *Morrison v. Baird*, 10 Ct. of Sess. Cas. (4th series), 271. The purport of section 1 was made clearer by the words, "under this Act," just quoted from section 2, and the intent of section 2 obviously was to cut down and to limit the unqualified provisions of section 1 to cases where there had been negligence on the part either of the employer or of the person intrusted by him. See *Stuart v. Evans*, 49 L. T. N. S.

138, 31 Weekly Rep. 706; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 693.

It seems to follow that, as suggested by Roberts & Wallace, *Employers' Liability*, 208, the requirement of notice in section 4, in order to maintain an action "under this Act," does not mean that a workman is "to lose all right of action because he gives no notice of injury, even where the employer himself is the culpable person, and the workman is at death's door, during the whole of the six weeks." In *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 702, Fry, L. J., cites with approval, although to a different end, another passage from page 252 of the same work, a part of which is as follows: "Suppose that, altogether through the carelessness of the employer, or of the persons intrusted with the duty of looking after the ways, etc., a foot-bridge becomes and is allowed to remain in a defective and dangerous condition, so that a workman who is injured whilst using the bridge in the course of his duty and ignorant of its condition would clearly have a right to sue the employer in the first case at common law or under the Act, and in the second under the Act."

Whether correct or not, this was the state of comment upon and construction of the English statute when the Massachusetts Act was passed, copying its words very closely. We can not deal with the latter quite on the same footing as if the legislature had framed it in their own language, used for the first time. We must assume that they were content with the expounded meaning of the words which they adopted. But it would not need the aid of previous exposition to show that the main purpose of the statute, as the title intimates, is to extend the liability of employers in favor of employees, that it does not attempt to codify the whole law upon the subject, and that it leaves open some common-law defenses and some common-law liabilities. In view of these general considerations, we are to construe the statutes liberally in favor of employees, and we ought to be slow to conclude that indirectly, and without express words to that effect, it has limited the workman's common-law rights most materially in respect to the conditions and time of bringing an action, and the amount which he can recover. For all these provisions stand upon the same footing with regard to the present case. General maxims are oftener an excuse for the want of accurate analysis than a help in determining the extent of a duty or the

construction of a statute. But certainly with such a statute as this, we agree that common-law rights are not to be taken away by doubtful implications and affirmative words. *Wilbur v. Crane*, 13 Pick. 284, 290; *Barden v. Crocker*, 10 Pick. 383, 389; 2 Inst. 200; Com. Dig. Action upon Statute, C; *Chapman v. Pickersgill*, 2 Wils. 145, 146; *Wilson v. West Hartlepool R'y*, 2 DeG., J. & S. 475, 496.

However, instead of following the order of the English Act, the legislature sought to abridge and simplify matters by carrying over the qualifying clause which we have quoted from section 2 of the English Act into section 1 of our Act, so that it runs, when personal injury is caused to an employee, who is himself in the exercise of due care, etc., by reason of any defect in the condition of the machinery, etc., "which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted," etc., the employee shall have the same right of compensation and remedies against the employer as if he had not been an employee, etc.

If we are right in the view which we take of the intention of the legislature, we should have had less difficulty in discovering it, and in carrying it out, if the language of the English statute had been followed less exactly, and if the transposition just mentioned had not been made. In 1887, it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if the duty was intrusted to another and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow-servant was no defense. *Gilman v. Eastern R. R.*, 13 Allen, 433, 440, 15 Am. Neg. Cas. 426, *ante*; *Lawless v. Conn. River R. R.*, 136 Mass. 1, 15 Am. Neg. Cas. 436, *ante*. The rule in *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, practically, if not in terms, had been modified very much in favor of servants; *Rogers v. Ludlow M'fg Co.*, 144 Mass. 198, 202. Furthermore, the requirement that the employee should himself be in the exercise of due care, which was left to implication in the English Act, is stated explicitly in ours. Thus it falls out that the part of section 1 to which we are referring seems at first sight to add nothing to the common law as previously declared, and by its form has very much the air of a legislative statement of the principle of the cases.

But we should assume that section 1, clause 1, was nugatory sooner than admit that it cut down the common-law rights of employees under the deceptive form of enlarging them. We certainly do not believe that by combining section 2, clause 1, of the English Act with section 1, clause 1, it meant to give any new meaning or scope to the two clauses, the words of which are so carefully followed. The intention was merely to abridge the model and make it more compact. As in the original, the reference to negligence is solely for the purpose of qualifying the operation of the other part of the sentence, not for the purpose of codification. The purport of the whole is still only to abolish, perhaps, the defense of implied assumption of risk, and certainly that of negligence of a fellow-servant (*Ashley v. Hart*, 147 Mass. 573) as it was in the English statute, and as is manifestly the case in the second and third clauses of the same section. Were this not so, the cumbrous conclusion, which applies to all the clauses alike, "shall have the same right, etc., as if he had not been an employee nor in the service of the employer," etc., hardly would have been adopted from the English Act. If there are no cases for which the first clause is needed, all that is to be said is, that to that extent the legislature too hastily assumed that the law of Massachusetts was the same as that of England.

We shall not undertake to decide until it is necessary whether section 1, clause 1, has not an operation in excluding the defense of implied assumption of risk, when the defect, although manifest, is still properly attributable to the negligence of the master or of a person intrusted by him, which is one of the cases held to be covered by the English Act; *Yarmouth v. France*, 19 Q. B. Div. 647; *Thrussell v. Handyside*, 20 Q. B. Div. 359; compare *Fraser v. Hood*, 15 Court of Sess. Cas. (4th series), 178. Neither shall we consider whether the Act would apply to cases where by our decisions negligence in making small repairs needed from day to day may still be attributed to a fellow-servant; *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Moynihan v. Hills Co.*, 146 Mass. 586. If the Act does apply to such cases, there is the stronger reason for saying that its only purpose is to extend the common-law liability to the previously excluded cases. And if the object is to make a rule which will reach extremes not touched by the common law, the fact that this is done by a new and broader rule, the

terms of which necessarily are wide enough to include the narrower common-law principle, does not show an intention to prejudice rights which the statute was not needed to create. Whether or not an action could be maintained under the statute in a case where there is a common-law remedy, as assumed in a passage which we have quoted concerning the English Act, we need not decide. If the facts warrant a recovery at common law, it is not likely that any plaintiff will wish to rely upon the statute, although when it is uncertain how the facts will turn out it may be necessary and proper to join a count on the statute with one on the common-law liability.

For the foregoing reasons we are of opinion that in those cases within the words of the Statute of 1887, c. 270, § 1, clause 1, in which the common law gives an employee a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent as if the statute had not been passed. We are also of opinion that, so far as section 1, clause 1, is concerned, the requirement of notice in section 3, as a condition to maintaining actions "under this Act," only applies to those extremes, if any, lying outside the common-law rule, but embraced by section 1, clause 1, unless a case shall arise in which the plaintiff, although he has a remedy at common law, insists on relying upon the statute alone. See the observations on *Goodhue v. Dix*, 2 Gray, 181, in *Reynolds v. Hanrahan*, 100 Mass. 313, 315.

Judgment for the plaintiff.

**REPORTS, NOTES AND ABSTRACTS OF MASSACHUSETTS CASES,
UNDER THE EMPLOYERS' LIABILITY ACT, STATUTE OF
1887, C. 270, AND THE AMENDMENTS THERETO.**

[*Note.* The classification adopted in the following cases is that of *causes of injuries*, such as MACHINERY, DEFECTIVE APPLIANCES, FALLING OBJECTS, BLASTING OPERATIONS, STAGING ACCIDENTS, ETC., instead of arranging the same under the several sections and clauses of the Employers' Liability Act, such classification following the general plan of the Notes of Cases in this volume. For Statutory actions brought by RAILROAD EMPLOYEES, see pages 457 to 475. *ante.* See, also, pages 446 to 450, *ante.*]

Employee slipping and hand injured by planing machine: Not a defect in "ways, works and machinery," under the Statute — Clause 1, Section 1, c. 270, Statute 1887.

In *May v. Whittier Machine Co.*, 154 Mass. 29 (*May*, 1891), verdict directed for defendant in the Suffolk Superior Court was sus-

tained and plaintiff's exceptions *overruled*, the case being stated by HOLMES, J., as follows: "The plaintiff, while engaged in helping another servant of the defendant in planing a board on a planing machine, started to go to the other end of the machine, slipped or stumbled, put his hand on the machine, and was hurt. There was an open floor in front of the machine by which he could have gone, although the floor was somewhat obstructed by unfinished work. He went by the back of the machine instead. There was an interval of three feet and one inch between the back of the planing machine and a band-saw, and a man was working at the band-saw in this interval. Some small pieces of wood had been piled up against the back of the planing machine by a fellow-servant of the plaintiff, making a pile about a foot high and one-quarter inch wide, so that, according to the plaintiff's testimony, the clear space was not more than fourteen inches. The plaintiff had known of the pile for about a fortnight. On these facts the judge rightly ruled that the plaintiff could not recover on the ground that there was a defect in the condition of the ways under the first section of the Employers' Liability Act, Statute 1887, c. 270, § 1. Apart from other reasons, the obstructions were only rubbish of accidental and temporary character, which has been declared not to be within the Act by *O'Connor v. Neal*, 153 Mass. 281. Assuming, for the sake of argument, that in some cases the plaintiff would have a right to go to the jury upon both a statutory and a common-law count, in view of the different possible findings on his evidence (*Ryalls v. Mechanics' Mills*, 150 Mass. 190, 196, and *Whiteside v. Brawley*, 152 Mass. 133), the plaintiff was not injured by being required to elect in the case at bar. If he had sought to recover at common law, the negligence, if there was any, was that of a fellow-servant; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209; *Moynihan v. Hills Co.*, 146 Mass. 586, 593; and there was no ground on which it could have been found that anybody knew or appreciated whatever danger there was more fully than the plaintiff. *Lewis v. N. Y. & New England R. R.*, 153 Mass. 73. Exceptions overruled."

Female employee injured by machine — Fellow-servant — Superintendence — Statute 1887, c. 270, section 1, clause 2.

In *Roseback v. Aetna Mills*, 158 Mass. 379 (March, 1893), tort, for personal injuries under the Statute of 1887, c. 270, plaintiff, a loom-fixer, while attending to a machine, injured by her left arm being caught by the sudden starting of the machine, verdict for defendant was sustained, the opinion (per BARKER, J.) being as follows: "That an ordinary weaver, whose usual work is merely to operate a loom, is not a person 'intrusted with and exercising superintendence, whose sole or principal duty is that of superintend-

ence,' within the meaning of the Statute of 1887, c. 270, section 1, clause 2, merely because it is also her duty, when her loom gets out of repair, to notify the loom-fixer to put it in order, is too plain for discussion. The weaver was no more than the plaintiff's fellow-servant, and the rulings were right. Exceptions overruled."

Minor Employee caught by gearing of carding machine — Superintendence — Statute 1887, c. 270, section 1, clauses 1 and 2.

In **Brady v. Ludlow M'fg Co.**, 154 Mass. 468 (October, 1891), tort, for personal injuries sustained by plaintiff while in defendant's employ, verdict directed for defendant was sustained, and plaintiff's exceptions overruled. The declaration, which was in four counts, alleged that plaintiff, while in the exercise of due care was injured in defendant's factory; the first count, which was at common law, alleged that he was injured by a failure of defendant to give him sufficient instructions as to his duties, and to notify him of the dangers and perils incident thereto; the second count, which was framed on the Statute of 1887, c. 270, section 1, clause 1, alleged that he was injured by the failure of the defendant, or of some person in his service intrusted with that duty, to keep the ways, works, and machinery in proper condition; the third count, which was framed on the Statute of 1887, c. 270, section 1, clause 2, alleged that he was injured by the negligence of some person in the defendant's service intrusted with and exercising superintendence, and whose sole and separate duty was that of superintendence; and the fourth count, which was also at common law, alleged that he was injured by the defendant's failure to furnish suitable machinery and appliances for the prosecution of plaintiff's work as an employee, and negligence in not keeping them in good repair and condition. It appeared that plaintiff was nearly eighteen years old at the time of the accident; that he was working upon a carding machine, and that while removing waste he was struck in the back by a "gate" or "fence" attached to the machine, was pushed or fell forward upon the machine, and was caught by the gearing. The trial judge called upon plaintiff to proceed under the first and fourth counts, or the third count being waived, under the second count, to which plaintiff excepted; and plaintiff having elected to go to the jury on the first and fourth counts, it was ruled that the evidence was insufficient and a verdict was ordered for defendant. The Supreme Court (opinion by KNOWLTON, J.) held that the ruling was correct.

Employee injured by gearing of drilling machine — Failure to give notice of injury as required by Statute of 1887, section 3.

In **Foley v. Pettie Machine Works**, 149 Mass. 294 (May, 1889), employee at work on a drilling machine in defendant's shop, injured

by hand being caught in gearing, there was judgment on the verdict directed for defendant. The syllabus to the official report states the case as follows:

"An experienced machinist, injured by accidentally putting his hand into uncovered gearing, which is in plain sight, and by which the power is transmitted to the machine upon which he is at work, cannot recover from his employer for his injuries; and the employer is not negligent in failing to give particular instructions to such machinist as to the risks of the employment.

"An employer of labor is not liable, under the Pub. Sts., c. 104, section 22, to a criminal prosecution, or to an action by an employee, for a violation of section 13, relating to the guarding of dangerous machinery, until the notice required by section 22 has been given to him by an inspector of buildings." [It was admitted that plaintiff could not recover under the Statute of 1887, c. 270, because he failed to give notice of his injury to defendant, as required by section 3 of that statute. Plaintiff, however, claimed to be entitled to maintain the action at common law.]

Minor employee injured while fixing belt of machinery — Assumption of risk — Statute of 1887, c. 270, section 1.

In **Mellor v. Merchants' Manufacturing Co.**, 150 Mass. 362 (January, 1890), minor employee injured by belt of machinery, defendant's exceptions were *sustained*. The syllabus to the official report states the case as follows: "An employee in a mill undertook of his own free will to make repairs, outside of his regular duty, on a defective pulley and belt, upon the suggestion of a fellow-workman who had no authority over him, and with the mere consent of his own immediate superior. He built a staging, and, just before the time for stopping the machinery for the day, was standing with his arm upon the staging, facing the belt and about twelve inches from it, looking up at it, and waiting for it to stop, when the belt came off and caught his arm, and he was injured. *Held*, that he voluntarily took the risk of an obvious danger, and could not recover under the Statute of 1887, c. 270, section 1, although he was in the exercise of due care." The opinion by the Supreme Court (per HOLMES, J.) discusses the maxim *volenti non fit injuria* and cites numerous American and English authorities.

Minor employee, a girl, injured while cleaning machine — Failure to show breach of duty on part of master — Statute of 1887, c. 270, section 1.

In **Ross v. Pearson Cordage Co.**, 164 Mass. 257 (September, 1895), action under the Employers' Liability Act for injuries to plaintiff, a girl nineteen years of age, caused by her hand being caught in the

cogs of a machine called a drawing frame, which she was cleaning, while employed in defendant's factory, judgment was rendered on the verdict for defendant. The syllabus to the official report states the case as follows: "Where a person is injured by the sudden starting of a machine which he is cleaning, if there is no defect in the machine, and it does not differ from similar machines in use elsewhere, and is in the same condition that it was when he entered upon his employment, the mere fact that certain contrivances, if on the machine, might have prevented its starting, is not sufficient to show a breach of duty on the part of his employer." Opinion by LATHROP, J.

Employee injured by planer machine — Statutory notice — Statute 1887, c. 270, section 3.

In *Veginan v. Morse*, 160 Mass. 143 (*November, 1893*), employee injured in defendant's mill by foot being cut off by knives of planer machine, plaintiff's exceptions to verdict for plaintiff were overruled. It was held that "if notice of the time, place, and cause of an injury is not served until after the writ is made in an action for the injury under the Employers' Liability Act (St. 1887, c. 270), although the notice is left at the defendant's house on the same day the writ is dated, the action cannot be maintained."

Laborer injured by saw machine — Fellow-servant — Superintendence — Statute of 1887, c. 270, section 1, clause 2.

In *O'Brien v. Rideout*, 161 Mass. 170 (*March, 1894*), tort, for personal injuries to plaintiff while in defendant's employ, verdict directed for defendant was sustained and defendant's exceptions overruled. The declaration contained two counts, the first, at common law, alleging that "said injury was due to the negligence of the defendant, by his foreman and agent, in setting the plaintiff to work on a machine which required an amount of skill which he knew the plaintiff did not possess, and by not notifying the plaintiff of the dangers and perils incident to the use of said machine;" and the second, under the Employers' Liability Act, Statute 1887, c. 270, section 1, clause 2; alleging that plaintiff "was, while in the exercise of due care, injured by a circular saw, upon which he was set to work by the negligence of some person in the service of the defendant intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, and who knew the dangerous character of the above described machine."

The opinion of the Supreme Court was rendered by BARKER, J., as follows:

1. The plaintiff was hired as a common laborer, and the defendant was not present when he was put to work on the saw by the

ing to him from neglect by them of a duty which they owed him. *Curley v. Harris*, 11 Allen, 112; *Kimball v. Cushman*, 103 Mass. 194; *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *Hayes v. Phila. & Reading Coal & Iron Co.*, 150 Mass. 457; *Bickford v. Richards*, 154 Mass. 163; *Heaven v. Pender*, 11 Q. B. D. 503; *Elliott v. Hall*, 15 Q. B. D. 315; *Smith v. London & St. Katharine Docks Co.*, L. R., 3 C. P. 326. We think, therefore, that the plaintiff should have been allowed to go to the jury on the common-law count. The plaintiff also contends that he should have been allowed to go to the jury on the count under section 4 of the Employers' Liability Act, and it is necessary to consider that question.

"The purpose of that section evidently was to enlarge the liability of the employer; otherwise, it is meaningless. The inference from the section plainly is that the employer should be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. If, therefore, there was a relation of employer and contractor, as appears to have been the case between the defendants and Toomey, as to any part of the former's work, and the plaintiff was injured by reason of a defect in any of the machinery furnished by them to Toomey for such work which arose from, or had not been discovered or remedied through, their negligence or that of some one intrusted by them with the duty of seeing that it was in proper condition, then the defendants would be liable. By the negligence of the employer, we understand to be intended his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employee is spoken of. There was evidence that the defendants were bound to keep the machine in repair, and that they had the right and opportunity to inspect it, and were frequently in the room where it was. Whether the want of repair was due in any respect to their own negligence was, we think, under the circumstances, a question for the jury. We cannot say that a jury would not be justified in finding that they should have examined the machines themselves, in the exercise of reasonable care. It has already appeared that there was evidence which would have warranted the jury in finding that Toomey was intrusted by the defendants with the duty of seeing that the machine was in proper condition. The fact that he also occupied towards them the relation of a contractor would not relieve the defendants from liability for his negligence in seeing that the machine was in proper condition.

"One person may sustain different relations to another, as well as different relations to different persons. Whether the want of repair was due to any negligence on the part of Toomey was also, we think, a question for the jury, and the plaintiff should have been allowed to go to the jury on the question of the liability of the defendants under section 4 of the Employers' Liability Act.

"The remaining question relates to the admissibility of certain testimony offered by the plaintiff, tending to show that for a long time prior to the accident automatic guards had been in use upon such machines, for the purpose of preventing the head block from coming down in case there was any defect in the machine, and that the defendants knew of such guards, and the plaintiff did not know of them. This testimony was excluded by the court, and we think rightly. For a part of three years prior to the accident, the plaintiff had worked upon a machine like that upon which he was injured. He was twenty-five years old at the time of the accident, and, for aught that appears, was of ordinary intelligence. He knew that there was no guard on the machine, and no way of preventing the head from coming down if the machine was out of order. The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use on such machines was immaterial. He agreed to work on the machine as it was, and the defendants owed no duty to him to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff cannot now claim that one should have been put on. *Pingree v. Leyland*, 135 Mass. 398; *Moulton v. Gage*, 138 Mass. 390. Exceptions sustained." (H. F. HURLBURT & E. T. MCCARTHY, appeared for plaintiff; W. H. MOODY, for defendants.)

Clothing caught on shaft of machinery — Knowledge of danger — Assumption of risk — Statute of 1887, c. 270, section 1.

In *Connelly, Adm'x, v. Hamilton Woolen Company*, 163 Mass. 156 (February, 1895), employee engaged in whitewashing the walls and ceiling of a card-room in defendant's mill, while machinery was in operation, fatally injured by coming in contact with a shaft, it was held that no cause of action was shown, either at common law or under the Statute of 1887, c. 270. The Supreme Court (per BARKER, J.) said:

"The plaintiff's intestate voluntarily undertook the very dangerous work of whitewashing the walls and the ceiling of a card-room, while the machinery was in operation. The dangers to which this work exposed him were open and obvious. He was capable of fully understanding them, and must be taken to have comprehended them.

Besides this, he had been specially cautioned to look out for the pulleys and shafting, and it was by coming in contact with a shaft, apparently as a result of losing his balance while at work standing upon an elevated wooden horse or staging, that he was caught and injured. It is urged that there was a keyway in the end of the shaft which made it more likely to catch his clothing than a plain shaft. But the keyway was not a defect, and the shaft was in the same condition when he was hurt as when he began to whitewash the room. The danger of being caught by contact with the shaft, whether he knew of the keyway or not, was so great and obvious, that he must have appreciated and taken upon himself the risk of being caught and injured by coming in contact with the shaft. It was not necessary that he should appreciate every particular of the danger. *Downey v. Sawyer*, 157 Mass. 418, 420. Nor does the case show that his employer failed in any respect in his duty to the deceased. *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 160, and cases cited." * * *

Employee caught by rope connected with stationary engine — Assumption of risk — Statute of 1887, c. 270, section 1.

In *O'Brien, Adm'x, v. Staples Coal Co.*, 165 Mass. 435 (March, 1896), tort, under the Employers' Liability Act, by the administratrix of the estate of Daniel O'Brien, for personal injuries occasioned to her intestate while he was in the defendant's employ by being caught by a rope connected with the drum of an engine at one end, the other end of which ran through a block nearly a hundred feet from the engine to another engine and was fastened to a scoop which was used for leveling off coal between two runs in the coal yard, verdict directed for defendant was proper, and plaintiff's exceptions were overruled, it being held that he assumed the risk. Opinion by LATHROP, J.

Employee killed by revolving shaft — Evidence — Conjecture — Statute of 1887, c. 270, section 1.

In *Irwin v. Alley ET AL.*, 158 Mass. 249 (March, 1893), tort, by the widow of William J. Irwin, under the Statute of 1887, c. 270, and the amendment thereof, for causing his death, defendants' exceptions were sustained. The opinion by HOLMES, J., states the case as follows: "This is an action brought to recover compensation for the death of the plaintiff's husband. Statute 1887, c. 270. The plaintiff has had a verdict, and the question for us is whether there was any evidence sufficient to warrant it. The plaintiff was killed in a leach and cooler building attached to the defendants' tan yard, in which he had worked from one to two years. In this building was an opening, three feet square, looking down into the tan-yard.

In the bottom of the opening was a low trough leaving fifteen inches free. Above this opening, forty-six inches from the floor, was a long revolving shaft. The lengths of shafting were coupled together at their ends by iron flanged couplings bolted together by bolts and nuts, the bolts running through the face of the couplings and parallel to the shaft. One of these couplings was over the west side of the opening, and one of the bolts projected from a quarter to a half inch beyond the safety flange, so that manifestly anyone coming in contact with it while the shaft was revolving would be in great danger of being caught and whirled round. The plaintiff's husband was caught in this way, and killed. He first was seen as he was dropping from the shaft, most of his clothes having been torn off from him and wrapped around the shaft. The only occasions which the deceased had to come near the coupling was to oil the machinery, and to communicate with the men in the yard. He was not doing the former, as his oil can was found in its place. It does not appear that he was doing or attempting to do the latter, and, so far as the evidence goes, it tends to show that he had no occasion to do so. This is the plaintiff's case, and in view of the manifest dangers of a revolving shaft, whether the deceased knew of the projecting bolt or not (*Russell v. Tillotson*, 140 Mass. 201), and in view of the absence of any known occasion for the deceased to be near it, we are of opinion that the questions how the accident happened and whether the deceased was using due care can be answered only by conjecture. This is enough to dispose of the case without going further. *Shea v. B. & M. R. R.*, 154 Mass. 31. Exceptions sustained."

Employee injured while hoisting ice — Defective appliance — Evidence — Statute of 1887, c. 270, section 1.

In *Carbury v. Downing*, 154 Mass. 248 (*June, 1891*), tort, under the Employers' Liability Act (1887), to recover for personal injuries sustained by plaintiff while engaged in hoisting ice in defendant's employment, defendant's exceptions to verdict returned for plaintiff were sustained, it being held that the facts did not warrant the case going to the jury. "The plaintiff's declaration alleges that the defendant was negligent in not furnishing suitable and proper apparatus and machinery for performing the work on which the plaintiff was engaged, so that the plaintiff's hand was drawn into a wheel connected with said apparatus and injured. The machinery and apparatus consisted of a steam-engine and drum, a rope, ice tongs, and two gin-wheels, and were used in hoisting cakes of ice up a steep incline, or run, about twenty-five feet, to the top of another run at right angles to the first, down which the ice was allowed to slide to the ice lofts. The rope passed from the drum on the engine

through gin-wheels at the foot and at the top of the steep run, and terminated in a loop in which the ice tongs were suspended. When the ice was hoisted, the rope extending from the ice at the foot of the steep run, up through the upper gin-wheel, and down through the lower gin-wheel, and horizontally to the drum of the engine, was wound around the drum until the ice reached the top of the run, when it was stopped by stopping the engine. The upper gin-wheel was so situated that, when the ice reached the top of the steep run, it swung over into the other run, which sloped downward to the ice lofts. The plaintiff was employed to guide the ice from the top of the one run to the other, and to unhook the tongs from the ice and pull them back. On the occasion when the plaintiff was injured, according to his testimony, when the ice arrived at the top of the run, he took hold of the rope at the loop to guide or push the ice onto the other run. The rope was not stopped, and his hand was drawn with the rope into the gin-wheel, which was a few inches above his head." *Held*, that the evidence did not show that the rope was insufficient as contended by plaintiff.

Defective appliance — Statute of 1887, c. 270, section 1, clause 3.

In *Geloneck v. Dean Steam Pump Company*, 165 Mass. 202 (*February, 1896*), employee engaged in moving articles from one place to another in defendant's factory, using a four-wheel truck, which had an iron handle about three feet long, for the purpose, injured while assisting other employees, by request of his foreman, in moving a pump, defendant's exceptions to verdict for plaintiff were *overruled*. The Supreme Court (per BARKER, J.) said:

"1. Whether the plaintiff was hurt by an occurrence the risk of which he had assumed was a question for the jury, because of the plaintiff's contention that there were no washers on the truck, and that their absence constituted a defect, which questions of fact it appears by the bill of exceptions were left to the jury without objection on the part of the defendant.

"2. The ruling that there was no sufficient evidence that the plaintiff's injuries were caused by the negligence of one whose sole or principal duty was that of superintendence was rightly refused. Upon the evidence, whether Ryan stood in that relation was a question of fact. See *O'Neil v. O'Leary*, 164 Mass. 387.

"3. The jury was instructed in substance, that, to constitute a defect in the condition of the ways, works, or machinery, it was not necessary that any particular instrument should be defective in itself; that, for instance, the plaintiff need not show that there was a fault in the truck, that it had a cracked wheel, or a broken axle-tree, or something of that kind which gave way; that in the sense of the law a thing may be found to be not reasonably safe and suitable if it is

insufficient and unsuitable for the purposes to which it is applied and is intended to be applied, and under the conditions in which it is used and is intended to be used; that the question is not limited to whether there is something which has a weak spot, or a crack, or is decayed, but it involves the inquiry whether the appliances, as they are put together and used and intended to be used, are reasonably safe and suitable. In connection with this instruction the jury was also told that the defendant was not obliged to have a faultless arrangement, or one with which nobody could find any fault, but only to use reasonable care to have things reasonably safe and suitable.

"These instructions were correct. An unsuitableness of ways, works, or machinery for work intended to be done and actually done by means of them, is a defect within the meaning of Statute 1887, c. 270, section 1, clause 1, although the ways, works, or machinery are perfect of their kind, in good repair, and suitable for some work done in the employer's business other than the work in doing which their unsuitableness causes injury to the workmen. In such a case the employer is wrong in furnishing appliances for a use for which they are unsuitable, and in effect in so ordering and carrying on his work that, without fault of the ordinary workman, the natural consequence will be that the appliances will be used for purposes for which they are unsuitable.

"The circumstance that the employer intends that his work shall be done in the manner and by the means in use when the accident occurs distinguishes the case from those in which he furnishes a stock of appliances from which the workman is to select such as are fit for the particular work in hand, as in *Zeigler v. Day*, 123 Mass. 152; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209; *Carroll v. W. U. Tel. Co.*, 160 Mass. 152; *Allen v. Smith Iron Co.*, 160 Mass. 557. Such an unsuitableness is neither accidental nor temporary, nor due to the negligence of a workman who is not charged with the duty of attending to the fitness of the ways, works, and machinery; and this circumstance distinguishes the present case from *Ashley v. Hart*, 147 Mass. 573; and from *O'Connor v. Neal*, 153 Mass. 281; *O'Keefe v. Brownell*, 156 Mass. 131; *Beauregard v. Webb Granite & Construction Co.*, 160 Mass. 201; and from *Carroll v. Willcutt*, 163 Mass. 221. An employer cannot say that he is not in fault, if his ways, works, and machinery, when used as he intends them to be used, are unsuitable for his work. See *Smith v. Baker* [1891] App. Cas. 325." * * *

Minor employee injured by freight elevator — Fellow-servant — Superintendence — Statute of 1887, c. 270, section 1.

In *Sullivan v. Lally and another*, 166 Mass. 265 (*May*, 1896), tort, under the Employers' Liability Act, for injuries to plaintiff, a boy

fifteen years old, an employee of defendants, caused by negligent operation of a freight elevator, plaintiff's exceptions to verdict directed for defendants were overruled. The opinion rendered by MORTON, J., states the case as follows: "It does not appear that the plaintiff did not possess the average intelligence of boys of his age. There was nothing unapparent or complicated about the elevator or its operation. The plaintiff testified that he knew all there was to do with the elevator, and no reason is disclosed why he should not have known it, though he was only fifteen years and four months old at the time of the accident. He knew that Brown [a fellow-employee] was a green hand, and even a boy must know, we think, that green hands are liable to do things which experienced ones would not. The accident appears to have been caused by the manner in which Brown started the elevator, and about which the plaintiff had previously instructed and cautioned him. We do not think that the evidence discloses any negligence on the part of the defendants or their superintendent. *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Henry v. King Philip Mills*, 155 Mass. 361. Exceptions overruled."

Employee scalded — Blow off pipe — Statute of 1887, c. 270, sec. 1.

In *McLean, Adm'x, v. Chemical Paper Co.*, 165 Mass. 5 (*November, 1895*), it was held (as per syllabus to the official report) that: "An action under the Employers' Liability Act, Statute 1887, c. 270, as amended by Statute 1892, c. 260, for causing the death of the plaintiff's intestate after a period of conscious suffering, cannot be maintained if the plaintiff fails to sustain the burden of showing that his intestate, at the time he was injured, was in the exercise of due care." Opinion by LATHROP, J. The action was by the administratrix of the estate of Hugh McLean, for personal injuries sustained by her intestate while in the employ of the defendant, from which he afterwards died, the death not being instantaneous, but being preceded by conscious suffering. It appeared that the intestate was sixty-five years of age at the time of the accident. He was in charge of the rag-room and bleach-room of defendant. The first floor and basement of a building were occupied by rotary bleach boilers. These boilers were filled with stock, which was then cooked by steam let into the boilers. The contents of the boilers, when cooked, were emptied on to the basement floor, and the water drained off into a brick sewer which ran under a yard outside of the building into a river. At times some of the stock which escaped during the draining process into the sewer would clog the sewer. In the yard was a manhole running down to the sewer, which was used for the purpose of cleaning out the sewer when it was so clogged. This was done sometimes from the ground, with the use of a stick, and sometimes by a person letting himself down into the manhole and standing on

a brick projection near the floor of the sewer. It was the duty of the intestate to see that the sewer was kept clear and that the water ran off the bleach-room floor; and the men who were in the intestate's department usually did the cleaning out of the sewer. At right angles with the bleach-room was the steam boiler house. Connected with the boilers was a blow-off pipe, which came out into the yard and ran along towards the manhole on the top of the ground, on a tier of bricks, and ended fifteen feet from the manhole. This pipe was covered with a plank, and there was more or less rubbish over it. When the steam boilers were blown off, the water and steam came out of the pipe, and struck with great force against the opposite wall of the manhole, spraying all around. This wall came above the ground one or two tiers of bricks, so that it would catch the water. This condition of things had been substantially the same for many years. On the evening of the accident there was evidence from which the jury might have found that the intestate was in the yard by the manhole, just beginning to clean it out, when the fireman in charge of the boilers, finding that one of them had more water than it needed, blew it off. The result was that the intestate was so badly scalded that he died after several hours of conscious suffering. * * * Judgment on the verdict directed for defendant.

Employee injured by bursting of ale bottle — Assumption of risk — Statute of 1887, c. 270, section 1.

In *Lehman v. Van Nostrand*, 165 Mass. 233 (February, 1896), tort, under the Employers' Liability Act, defendant's exceptions to verdict returned for plaintiff were *sustained*. ALLEN, J., rendered the following opinion: "The injury to the plaintiff resulted from the bursting of a bottle of ale while he was engaged in packing ale for the defendant. There was evidence tending to show that the ale was too lively to be handled with safety, and was likely to cause the bottles to burst. The plaintiff had been at work for the defendant about ten days. Before that he had had a large experience in packing sweet beers, ale, and lager in champagne bottles, but had never seen a bottle of ale explode like that which caused the injury to him until the day of the accident. On that day, two bottles had previously exploded, and he knew that this was because the ale was in too lively a condition, and before he was injured he knew there was danger in handling the bottles and packing them. The accident to the plaintiff happened about an hour afterwards. The plaintiff needed no more instruction to inform him that there was danger, and in fact he knew and appreciated the risk, and must, upon his own statement, he held to have assumed it; and in the opinion of a majority of the court, the defendant was entitled to an instruction to the jury accordingly. Exceptions sustained."

Dangerous premises — Fall of roof of tannery — Notice of injury — Statute of 1887, c. 270, section 1, clause 1, and section 3.

In *Dolan v. Alley et al.*, 153 Mass. 380 (February, 1891), tort, for personal injuries sustained by plaintiff while working in defendants' tannery, verdict for plaintiff was sustained and defendants' exceptions were overruled. The second count of the declaration, which was framed on the Statute of 1887, c. 270, section 1, clause 1, alleged that the plaintiff, while in the employ of the defendants and in the exercise of due care, "sustained personal injury because of the falling in and upon him of the roof of said tannery and the piping and fixtures connected therewith and placed thereunder. And the plaintiff says that at the time aforesaid the condition of said tannery and the roof thereof was defective and unsafe, and that said defective and unsafe condition of said tannery and roof had not been discovered and remedied owing to the negligence of the defendants and of the person in the service of the defendants intrusted by them with the duty of seeing that said tannery and roof were in proper condition." It appeared that an accumulation of snow on the roof caused the roof to fall in. The question as to sufficiency of notice was passed upon. The point is thus stated in the syllabus to the official report: "A notice in writing to an employer of the time, place, and cause of an injury occasioned to his employee, signed 'C. & P., Attorneys for C. D.,' purports to be signed 'in behalf' of C. D., within the Statute of 1887, c. 270, section 3, as amended by the Statute of 1888, c. 155, and, in the absence of evidence to the contrary, sufficiently shows that they were authorized to sign it." Opinion by LATHROP, J.

Fall of bank of earth — Statute of 1887, c. 270, section 2.

In *Shinners v. Proprietors of Locks and Canals on Merrimack River*, 154 Mass. 168 (June, 1891), plaintiff's exceptions to verdict returned for plaintiff in the Middlesex Superior Court were overruled. The action was brought, under the Statute of 1887, c. 270, section 2, by the widow of Matthew Shinners, to recover damages sustained by her in consequence of the death of her husband, caused by the falling upon him of a portion of a bank of earth, while he was working as a day laborer in the employ of the defendant corporation, and engaged in digging a trench in Lowell. He died without conscious suffering. The bank was eighteen feet high, and was composed of hard gravel, clay, and marl. The plaintiff contended that the fall of the bank took place in consequence of the unreasonable neglect of the defendant to have the bank properly shored up. Opinion by LATHROP, J.

Fall of heavy roller which was being hoisted — Defective appliance — Statute of 1887, c. 270, sections 1 and 3.

In *O'Keefe v. Brownell and another*, 156 Mass. 131 (March, 1892), tort, under the Statute of 1887, c. 270, for personal injuries to plaintiff's intestate while in defendants' employ, verdict directed for defendants was sustained and plaintiff's exceptions overruled. The declaration was as follows:

"And the plaintiff says that he is the duly appointed administrator of the goods and estate of Daniel O'Keefe, that said intestate, on September 8, 1890, while in the employ of the defendants and in the exercise of due care, by the reason of the negligence of a person in the service of the defendants intrusted with and exercising superintendence, whose sole and principal duty was that of superintendence, was injured; from which injuries, after great mental and bodily suffering, on the 12th day of September, 1890, he died. The said injuries occurred while the plaintiff's intestate was working upon a schoolhouse in New Bedford then in process of erection in manner following, to wit: a heavy roller, used in the rolling of heavy timbers which had been hoisted from the lower floor of said building to the upper floor, was placed at the edge of a well, and said roller being in use on the third floor of said building, and not properly secured, did fall through said well to the lower floor of said building, striking with great force upon the intestate's head, thereby causing the injuries complained of. The plaintiff says that he, within thirty days after his appointment as administrator gave written notice, as required by statute, to the defendants.

"The plaintiff further says that he relies upon the statute of 1887, c. 270, and the amendments thereto.

"Second count. The said plaintiff as described in the first count further says, that his intestate, as described in the first count, was injured by reason of a defect in the condition of the ways, works, or machinery connected with or used in the business of the defendants, which arose from or had not been discovered or remedied owing to the negligence of the employers, or of any person in the service of the employers and intrusted by them with the duty of seeing that the ways, works, or machinery were in proper condition.

"And the plaintiff says that his intestate was in the exercise of due care, and that the defendants were not. The plaintiff further says, that he gave the notice and relies upon the statute, as alleged in the first count." The Supreme Court (per BARKER, J.) says:

"It is unnecessary to consider whether the notice was good, since upon the evidence the plaintiff has no right of action under either count of his declaration.

"The duty of securing the tool by the fall of which the plaintiff's intestate was injured, so that when in use for the purpose for which

it was employed at the time of the accident it would not be liable to fall, was not a duty of superintendence. If the tool as then used constituted, with its surroundings, a defect in "ways, works or machinery," the defect arose solely from the negligent use of the tool by fellow-workmen of the plaintiff's intestate, and did not arise from the negligence of the defendants, or of any person in their service intrusted with the duty of seeing that the ways, works, and machinery were in proper condition. It was not negligence for the defendants not to have discovered and remedied it, by themselves or others." * * * The court reviewed the evidence and held that plaintiff could not recover upon either count.

Employee killed by stone falling from derrick — Statute of 1887, c. 270, section 1, clauses 1 and 2, and section 3.

In **Beauregard v. Webb Granite & Construction Co.**, 160 Mass. 201 (November, 1893), a new trial was granted, the syllabus to the official report stating the points as follows:

"All the grounds of liability which there is any evidence to support under St. 1887, c. 270, section 1, clauses 1 and 2, may properly be adjudged separately in separate counts; but whether they can all be alleged conjunctively in one count, *query*."

"A notice to an employer under St. 1887, c. 270, recited that an employee was killed 'by a stone being precipitated upon him from your derrick as a result of your negligence, and of the negligence of some person for whose negligence you are liable.' *Held*, that the notice was either sufficient, or that the jury might find that there was no intention to mislead, and that the defendant was not misled by it."

Fall of bank of earth — Statute of 1887, c. 270, sec. 1, clauses 1 and 2.

In **Lynch v. Allyn**, 160 Mass. 248 (December, 1893), action under the Statute 1887, c. 270, section 1, clauses 1 and 2, for personal injuries to an employee of defendant, his leg being broken by the falling of a bank of earth on which he was working, defendant's exception to verdict returned for plaintiff was sustained on the following ground (stated by LATHROP, J.):

3. The third request made by the defendant was as follows: "The plaintiff cannot recover under his second count, because there was no evidence that the accident occurred by reason of any defect or want of repair in the condition of the ways, works, or machinery connected with or used in the business of the defendant." This request raises the principal question in the case, namely, whether the liability of a bank of earth, upon which laborers employed by a person are at work, to fall when undermined if not shored up, can be said to be "a defect in the condition of the ways, works, or

machinery connected with or used in the business of the employer," when the work on the bank is simply the levelling of it for the purpose of grading the land of a third person. It seems to us that clause 1 of this section has no application to a case like the one before us, and that the request should have been given." * * *

Fall of iron door on employee — Defective appliance — Statute of 1887, c. 270, section 1.

In *Allen, Adm'x, v. G. W. & F. Smith Iron Co.*, 160 Mass. 557 (*March, 1894*), it was held that the action could not be maintained on the facts, as stated in the opinion by HOLMES, J., as follows: "This is an action under the Employers' Liability Act, St. 1887, c. 270, for the death of the plaintiff's intestate. He was killed by the fall of a semi-circular iron door, which formed half the bottom of a cylindrical furnace, and which he was helping to raise and shut. A wooden lever by which a fellow-workman was helping to raise the door on its hinges broke, the door swung down and struck an iron lever held by the deceased, and drove it into his abdomen. The question is whether the case should have been taken from the jury. The plaintiff says that there was a case for them on the ground that the defendant failed to furnish a proper lever. We are of opinion that the defendant was entitled to a verdict. In the first place, there is no evidence that the stick was defective except that it broke, and none that it appeared defective or could have been discovered to be so. It had been in use for a long time, but was not specially worn at the point of strain. It would not have been permissible for the jury to find that the stick ought to have been known to be defective because of its age alone. In the next place the whole matter was in the hands of the deceased. He was the person in immediate charge of the furnace. If a new stick was needed, it was his business to know it. The primary duty rested on him, not on any superior officer. Again, if a new stick had been needed, it could have been obtained of the carpenter by the deceased at any time. The defendant kept a stock of lumber of the proper size on hand, and the deceased only had to ask for what he wanted. If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach. *Carroll v. W. U. Tel. Co.*, 160 Mass. 152. Exceptions sustained." (R. F. HERRICK and G. CUNNINGHAM, appeared for defendant; E. AVERY and A. E. AVERY, for plaintiff.)

Employee killed by fall of derrick — Notice of injury — Statute of 1887, c. 270, sections 1 and 3.

In *Brick v. Bosworth*, 162 Mass. 334 (*November, 1894*), tort, under the Employers' Liability Act, Stat. 1887, c. 270, sections 1

and 2, by a widow for death of employee, caused by fall of derrick upon him, plaintiff's exceptions on verdict returned for defendant were sustained. The declaration contained two counts, the first of which alleged that Brick was in the employ of the defendant, who used a derrick in connection with his work; that, while Brick was in the exercise of due care, the derrick fell upon him and instantly killed him, or he died without conscious suffering; and that the derrick was in a defective and unsafe condition, owing to the negligence of the defendant or of some one in his service and intrusted by him with the duty of seeing that the derrick was in proper condition. The second count alleged that Brick was working under one Philips, who was employed by the defendant as a foreman, and was intrusted with and exercised superintendence over the work, or whose sole or principal duty was that of superintendence; and that, by reason of the negligence of Philips in superintending the work, on November 8, 1892, the accident occurred.

On the question of the sufficiency of the statutory notice the Supreme Court (per KNOWLTON, J.) said: "The judge submitted to the jury the question of the sufficiency of the notice in regard to its statement of the cause of the injury, and in closing this part of the charge used these words: 'If you are satisfied under this evidence, by a fair preponderance, that the defendant was not misled, then the notice is sufficient; if you are not so satisfied then your verdict should be for the defendant.' The notice was treated as if it required the aid of a finding of fact under St. 1887, c. 270, section 3. No testimony was introduced for the purpose of showing that the defendant was not misled, and the jury were not instructed in regard to the kind of proof that might be resorted to for maintenance of this proposition, and there is nothing to indicate that the subject had been discussed in their hearing. The judge had previously said in his charge to the jury: 'The only question is whether this notice is a sufficient one in one of its aspects under the statute.' He treated it as sufficient in regard to the time and place, and we infer that he deemed it inaccurate by reason of its failure to designate the kind of negligence which caused the accident, so as to show the defendant upon which of the first two clauses of the Statute of 1887, c. 270, section 1, the plaintiff relied. But the notice was not inaccurate in this particular. It was sufficiently full and specific to entitle the plaintiff to recover under either clause of the statute applicable to such negligence. *Lynch v. Allyn*, 160 Mass. 248; *Donahoe v. Old Colony Railroad*, 153 Mass. 356; *Whitman v. Groveland*, 131 Mass. 553, 555. The jury should have been instructed in accordance with the plaintiff's request, 'that the notice was sufficient as matter of law.'" * * *

Fall of iron block from derrick — Defective rope — Statute 1887, c. 270, section 1, clauses 1 and 2.

In *Graham v. Badger and another*, 164 Mass. 42 (June, 1895), tort, for personal injuries sustained by plaintiff by the fall of an iron block from a derrick upon him while in defendant's employ (the declaration containing four counts, the first at common law, and the other three under the Statute 1887, c. 270, section 1, clauses 1, 2), defendants' exceptions to rulings and refusals to rule on the part of the Superior Court, Norfolk (HAMMOND, J.), being overruled. The case is thus stated by HOLMES, J.:

"This is an action of tort to recover for personal injuries caused by the fall of an iron block from a derrick upon the plaintiff, who was working in the defendants' employ. The fall was due to the breaking of a rope at a point where it had been spliced. The weight attached to the rope was not sufficient to break or to endanger the apparatus if in proper condition. The main question is whether the judge before whom the case was tried was right in refusing to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendants, and in instructing the jury that, if they found that the rope was defective while in the defendants' care, that fact was evidence which, unexplained, would warrant them in finding that the defendants were negligent.

"We are of opinion that the instruction was correct. *Res ipsa loquitur*,— which is merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that, therefore, there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence. See *Doyle v. B. & A. R. R.*, 145 Mass. 386, 387, 388; *Howser v. Cumberland & Penn. R. R.*, 80 Md. 146." * * *

Fall of timber — Superintendence — Statute 1887, c. 270, sec. 1, cl. 2.

In *Gagnon v. Seaconnett Mills*, 165 Mass. 221 (February, 1896), defendant's exceptions to verdict returned for plaintiff were overruled. Opinion by BARKER, J. Action on tort, under the Employers' Liability Act, Statute 1887, c. 270, for personal injuries sustained by plaintiff by the falling upon him of a timber, while in defendant's employ. The fourth count of the declaration, upon

which the case was submitted to the jury, alleged that the plaintiff's "injury was caused by reason of the negligence of some person in the service of the defendant intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, whereby said timber was improperly and unsafely loaded and conveyed upon said gear, and the road or passageway along which said timber was conveyed was suffered to be and remain in a defective condition."

Employee injured by fall of heavy stone from derrick — Superintendence — Statute 1887, c. 270, section 1, clause 2.

In **Crowley v. Cutting and another**, 165 Mass. 436 (March, 1896), tort, under Statute 1887, c. 270, as amended by Statute 1894, c. 499, for injuries sustained by plaintiff while in defendants' employ, the negligence alleged being that of a person exercising superintendence, a heavy stone which was being hoisted falling from a derrick, judgment was rendered on the verdict for plaintiff. The facts are stated in the opinion by LATHROP, J., as follows:

"At the time of the accident the defendants were building a mill in Andover. Barr was the general superintendent of the work, and McDonald was a foreman having charge of a gang of men occupied in lowering by means of a derrick the foundation stones into a trench dug to receive them, and in laying the stones. The stone which caused the injury was selected by McDonald, and was lowered towards the trench by means of iron dogs attached to the boom of the derrick. When lowered it was found to be too large to go into the trench. McDonald broke off a piece of it, and gave an order to hoist the stone. While the stone was being hoisted the plaintiff received an order to steady it as it was swinging. This order was given by McDonald, according to the plaintiff's testimony, or by Barr, according to the evidence put in by the defendants. The plaintiff put his hand on the side of the stone, as he testified, or underneath the stone, as a witness for the defendants testified. When the stone was five or six inches above the ground, the dogs slipped off, and the stone fell, crushing one or more fingers of the plaintiff.

"While there is no doubt from the evidence that McDonald did some manual labor, it clearly appears that this was but slight, and the jury would be warranted in finding that his principal duty was that of superintendence. *Malcolm v. Fuller*, 152 Mass. 160.

"There was also evidence that the cause of the fall of the stone was the negligence of McDonald while in the exercise of superintendence. The stone was a large one, weighing between thirty-five hundred and four thousand pounds. There was evidence that such a stone should have had holes drilled in it, into which the points of the dogs could be inserted; and that this was not done. McDonald was by the stone at the time the dogs were put on it, and indeed put

one of them on himself. The jury might well say that he should have ordered holes to be drilled, and that his neglect to give such a direction was the cause of the accident. See *Mahoney v. New York & New England R.*, 160 Mass. 573; *McPhee v. Scully*, 163 Mass. 216.

"Whether the plaintiff was in the exercise of due care was for the jury. The plaintiff was ordered to steady the stone. If, as he testified, he placed his hand on the side of the stone, we cannot say, as matter of law, that he was careless. The stone at that time was ascending, and he had no reason to suppose that it was going to fall, and had a right to rely upon the presumption that it was properly fastened. See cases above cited." * * *

Dangerous place — Falling from window joist — Superintendence — Statute 1887, c. 270, section 1, clause 2.

In *McCann v. Kennedy*, 167 Mass. 23 (October, 1896), verdict directed for defendant was sustained in action under the Employers' Liability Act. The opinion by HOLMES, J., stated the case as follows: "This is an action for personal injuries, on the ground of negligent superintendence. The plaintiff was at work upon a house in which the defendant was making some changes. He went up a ladder, stepped through a window, and then, in order to avoid a man who was working behind it, stepped to the left upon a joist which had been sawed nearly through for a well-hole, and fell. The plaintiff knew that the customary way to make well-holes was to lay the joists and then cut them out and, so far as appears, knew where this well-hole would be. It would seem from the plaintiff's testimony that the joist had been cut very recently. Another witness stated, without contradiction, that he had cut it a moment before the accident, and had gone to get an axe to knock the joist out. The only ground on which the plaintiff could recover is, that while the joist remained it was a trap, and that he ought to have been warned. But the danger was momentary, and it would be impracticable to require employers to warn their men of every such transitory risk when the only thing the men do not know is the precise time when the danger will exist. *Flynn v. Campbell*, 160 Mass. 128, 130. Exceptions overruled."

Employee shoveling coal into hold of vessel injured by contents of tub of coal — Statute 1887, c. 270, section 1.

In *Dolan v. Atwater and another*, 167 Mass. 274 (October, 1896), tort, under the Employers' Liability Act, for injuries to plaintiff while in defendants' employ engaged in shoveling coal into a tub in the hold of a coal barge lying next to the defendants' wharf, verdict directed for defendant was sustained. It appeared that the tub into which the plaintiff was shoveling coal was to be hoisted out of

the hold when filled, and that, while he was engaged in filling it, another tub filled with coal, which had just been hoisted out of the same barge, struck against a projecting bulkhead or apron over the defendants' wharf, and emptied itself of its contents, which fell upon the plaintiff's head, and caused the injuries complained of. *Held*, evidence insufficient to hold defendants liable. Opinion by BARKER, J.

Dangerous premises — Employee falling through hole in floor in building in course of construction — Superintendence — Statute 1887, c. 270, section 1, clause 2.

In *McCauley v. Norcross et al.*, 155 Mass. 584 (February, 1892), tort, under the Statute of 1887, c. 270, section 1, clause 2, for personal injuries sustained by plaintiff while in defendants' employ, defendants exceptions' to verdict for plaintiff overruled. The facts of the case (as stated in the official report) was as follows: "At the time of the accident, the defendants were engaged as contractors in the erection of a large building on State street, in Boston. The plaintiff, a laborer employed by them, was working on the second floor of this building. The third floor was all planked over, with the exception of one or more holes about six feet in length, and about six inches wide, which were left open for the purpose of occasionally hauling up materials, and to enable the workmen to fasten the ropes of a large arm derrick, which they were using at the time, to iron columns above. On the floor, near one of these holes, were a few iron beams, which had been there for two or three days. These beams were window lintels, about four and a half feet long, and weighing about forty pounds each. The plaintiff was wheeling a barrow of tiles across the second floor, and while he was near the center of the floor one of these beams fell through this hole in the third floor, and caused the injuries complained of. It was admitted that the plaintiff was engaged in his regular occupation at the time, and that he was in the exercise of due care. One Clark was the general superintendent in the service of the defendants, and was intrusted with and in charge of the construction of this building; and it was admitted that his sole or principal duty was that of superintendence. He testified that he had given no orders as to the placing of these beams, except the general order to the men to hoist the beams and place them on the floor so soon as they were left at the building; that at the time of the accident the beams were placed about three and one-half feet from the hole; that he was on crutches, walking about the third floor, in the exercise of his duties, and while so walking about, in order to pass between a pile of planks and these beams, he pushed one of the beams with his foot; and that the beam swung around on the other beams, and fell off from them and down

through the hole in the floor upon the plaintiff, while he was working on the floor below." * * * *Held*, that it was proper to submit the case to the jury.

Dangerous premises — Employee falling on concrete walk — Statute 1887, c. 270, section 1, clause 2.

In **Murray v. Knight and another**, 156 Mass. 518 (June, 1892), plaintiff's exceptions to verdict returned for defendant were overruled, LATHROP, J., stating the facts as follows: "The plaintiff, an employee of the defendants, was injured by falling on a concrete walk on the defendants' premises, which led from their mill to a public street. The declaration contained three counts, two at common law, and one under the Statute of 1887, c. 270, section 1, clause 2. The ground relied on under all the counts was that the walk was dark and slippery, being covered with ice, without ashes or sand upon it. There was conflicting evidence on these points; and, under the instructions of the court, the jury must have found that the defendants were not guilty of negligence in either of these respects. If the ruling requiring the plaintiff to elect to proceed upon the common-law counts or upon the statutory count was not within the discretion of the presiding judge, the plaintiff was not injured thereby, as the ruling was given at the close of the evidence, and the issues were the same; and she has no ground of exception. *Brady v. Ludlow M'f'g Co.*, 154 Mass. 468." * * *

Employee falling off coal shed — Assumption of risk — Statute 1887, c. 270, section 1.

In **O'Maley v. South Boston Gas Light Co.**, 158 Mass. 135 (January, 1893), tort, under the Employers' Liability Act, for injuries sustained by plaintiff while in defendant's employ, judgment was rendered on the verdict directed for defendant. The Supreme Court (per KNOWLTON, J.) said:

"The plaintiff, while wheeling coal in a barrow on a run in one of the defendant's coal sheds, fell off and was injured. The action is brought under the Employers' Liability Act (St. 1887, c. 270), for an alleged defect in the ways, works, or machinery of the defendant, it being contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work at various times during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction.

"If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened, and that the defendant is not liable. *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, 155 Mass. 513.

But it is contended that, under the statute referred to, the rule is different.

"It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the statute has taken away from defendants, in the cases mentioned in it, the defence that the injury was caused by the act of a fellow-servant of the plaintiff. It is also established by an adjudication of this court, and by decisions under a similar statute in England, that it has not taken away the defence that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it." * * * Citing authorities.

"The precise question involved in this case does not seem to have been settled in England, although there has been much discussion and a variety of opinion in regard to questions closely allied to it. It is held by all the judges there that the maxim, *volenti non fit injuria*, applies as well to actions under the statute as to those at common law; but none of the cases which have come to our attention have determined the effect of a contract to work in a place obviously dangerous by reason of inferior machinery or appointments when the contract was made. Sometimes it seems to have been assumed that the defence of an implied contract to assume the ordinary risks of a business is taken away by the statute, without recognizing any distinction between an implied contract founded on the known condition of the ways, works, and machinery in reference to which the contract is made, and a contract in reference to dangers from the negligence of fellow-servants, or the subsequent neglect of the master. In *Walsh v. Whitely*, 21 Q. B. D. 371, the decision of the Lords Justices Lindley and Lopes, a majority of the Court of Appeals, tends to support the view we have taken, although the judgment is on different grounds. So also does the judgment in *Thomas v. Quartermaine*, 18 Q. B. D. 685, which has been often considered and explained, but never overruled. In *Smith v. Baker*, (1891) A. C. 325, elaborate opinions were given in the House of Lords, showing considerable difference of view on some of the questions we have been considering; but the effect of a contract to work under exposure to peculiar dangers from machinery, obvious when the contract was made, was not much considered.

"In the present case, the plaintiff when he made his contract knew and fully appreciated the dangers to which he was about to expose himself; for they were obvious, and he had been accustomed to work on the runs, from time to time, for fifteen years, during which period they had remained unchanged. We are of opinion that he impliedly contracted to work on the runs as they were, and that, if they can be considered defective, the defect is not within the description in the St. of 1887, c. 270, section 1, inasmuch as the defendant owed him no duty in regard to it, and he cannot say that its continued existence was owing to the negligence of his employer."

Dangerous premises — Defective stairs — Statute 1887, c. 270, sec. 1.

In **Began v. Donovan and another**, 159 Mass. 1 (*April, 1893*), plaintiff's exceptions on verdict directed for defendant were *overruled*. The syllabus to the official report states the case as follows: "The plaintiff, while in the employ of the defendants, was ordered by them to carry a bar of iron down a flight of movable stairs leading into and intended to furnish permanent means of access to a cellar in which the defendants were making some alterations for the owner of the building. There was nothing to show that the steps were not suitable to be placed as they were, or reasonably to be expected to be in such position, or that the defendants had reason to suppose that they were insecurely fastened. As the plaintiff stepped upon the stairs they slipped from under him and he was injured. *Held*, that there was no evidence of negligence on the part of the defendants. *Held*, also, that they did not adopt the steps as a way used in their business within St. 1887, c. 270." Opinion by ALLEN, J.

Employee injured by fall of driving hammer — Foreman — Superintendence — Statute 1887, c. 270, section 1.

In **McPhee v. Scully**, 163 Mass. 216 (*March, 1895*), employee injured by having his hand crushed in a pile-driver, defendant's exceptions on verdict returned for plaintiff were *overruled*. The Supreme Court (per BARKER, J.) said:

"The defendant contends that the verdict against him should be set aside; first, because the evidence does not sustain the burden of showing that the plaintiff was in the exercise of due care; secondly, because the plaintiff ought to be held to have assumed the risk; thirdly, that the accident happened through the negligence of a fellow-servant; and fourthly, that, if the evidence shows a cause of action, the proof does not support the allegations of the declaration.

"The work was driving piles. The plaintiff was one of a gang of seven men, of whom one Fahey was foreman. At the time of the accident the plaintiff was aloft standing on a joist, swinging and steadying a suspended pile, to put it in position. This work was to be done by applying his strength directly to the pile, and he put his left hand on top of the pile and his right arm between the pile and one of the upright beams between which the pile stood. The driving-hammer was five feet above him, upheld by a chocking-block on which it rested while the piles were placed in position. The placing of his hand upon the top of the pile, directly in the line of descent of the hammer if it should fall, is the act which the defendant contends should charge the plaintiff with contributory negligence. But the fall of the hammer while the plaintiff was at his post was not to be expected; and if it should occur, there was no position in which he

could do his work of which safety could be predicated. He had a right to expect that the hammer would not fall, and the jury might find that he was in the exercise of ordinary care." * * *

After stating that plaintiff assumed the obvious risks, the court said: "But this is not conclusive against his right to have compensation for his injury, if upon the evidence there was, back of the dangers of which he assumed the risk, some breach of duty towards him on the part of his employer which could fairly be found to have been the cause of the accident. Such breaches of duty are charged in each count of the declaration. In the first count, the employing of careless, incompetent, and reckless fellow-workmen, whose carelessness, incompetency, and recklessness were known, or might with reasonable care and diligence have been known, to the defendant,—a breach of duty at common law. In the second count, negligence of a person in the defendant's service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence,—a breach of duty imputed to the employer by force of the St. 1887, c. 270. The evidence justified a finding that the foreman and the workman who got the fall foul of the chocking-block were drunk, and others of the men had been drinking at their work, from a bottle of liquor for which the foreman had sent one of the men." * * *

The court reviewed the evidence on this point and held that the jury were justified in finding that the foreman was an incompetent and reckless man, whom the defendant had employed either knowing his faults or chargeable with knowledge of them.

Employee pulling a loaded car on track, falling into ditch, and struck by car and killed — Statute of 1887, c. 270, sections 1 and 2.

In *Gustafsen v. Washburn & Moen M'fg Co.*, 153 Mass. 468 (*April, 1891*), where a verdict was directed for defendant in the trial court, the Supreme Court ordered a new trial, the case being stated in the syllabus to the official report as follows: "An employee, while engaged during the daytime in the course of his employment in assisting to pull a loaded car along a railroad track on the employer's premises, with his back to the car and fronting in the direction of a ditch across the track, fell into the ditch and was struck by the car and killed. The ditch was open and visible, but unguarded, and the employer had caused it to be dug, without giving warning thereof to his employees, in such a way as to render the track dangerous if used by them as they had been wont to use it, not knowing of the ditch. Held, in an action under the Statute of 1887, c. 270, sections 1, 2, that it was a question for the jury, in the absence of direct evidence that the deceased knew of the ditch, as to whether there was a defect in the condition of the ways used in the employer's business

which arose from his negligence, and whether the deceased was in the exercise of due care." It was held also that the statutory notice required upon the instantaneous death of an employee may be given by the widow of such deceased employee. Opinion by FIELD, C. J.

Employee in trench injured by boy falling upon him from street-car track — Accident — Statute 1887, c. 270, section 1.

In **Craven v. Mayers and another**, 165 Mass. 271 (*February, 1896*), tort, under the Employers' Liability Act, for injuries sustained by plaintiff while working in a trench engaged in laying a drain pipe, a boy fourteen years of age falling from the surface between the rails of the street-car track, striking him on the back of the neck and injuring plaintiff's spine, plaintiff's exceptions to verdict directed for defendant were overruled. ALLEN, J., rendered the following opinion: "The plaintiff knew that horse cars would come along every few minutes and be pushed over the trench by individuals. It was not expected that his work should stop whenever a car passed, nor that the cars should stop passing there. The suggested negligence on the part of the defendants is that they did not station a watchman there to prevent volunteers from helping to push cars over the trench. It seems to us, however, that the injury to the plaintiff must be deemed to have resulted from a pure accident, and that the omission to guard against it was not negligence on the part of the defendants. The evidence of what was usually done at other places and under different circumstances was rightly excluded. *Bailey v. New Haven & N. Co.*, 107 Mass. 496; *Hinckley v. Barnstable*, 109 Mass. 126. Exceptions overruled."

Employee injured — Superintendence — Statute 1887, c. 270, sec. 1.

McCart v. Squire et al., 150 Mass. 484 (*January, 1890*), was an action of tort under the Statute of 1887, c. 270, for personal injuries sustained by plaintiff while at work in defendants' factory, alleged to have been caused by the negligence of one White, "who was then and there in the service of said defendants, and intrusted with and exercising superintendence, and whose sole and principal duty was that of superintendence." Defendants' petition to establish truth of exceptions was referred to a commissioner. The trial resulted in verdict for plaintiff, defendants' exceptions being disallowed. The Supreme Court dismissed the petition to establish the exceptions.

Death of employee — Right of action — Statute 1887, c. 270.

Daly, Adm'r, v. New Jersey Steel & Iron Co., 155 Mass. 1 (*November, 1891*), was an action by the administrator of the estate of Maurice Driscoll, against the defendant for negligently causing the death of the intestate while in its employ. The questions discussed

turned upon the right of action under the Employers' Liability Act, and the Supreme Court held that the case came within the statute, and sustained plaintiff's exceptions on verdict directed for defendant.

**O'NEIL v. O'LEARY.
EARLEY v. O'LEARY.**

Supreme Judicial Court, Massachusetts, October, 1895.

[Reported in 164 Mass. 387.]

EMPLOYEES INJURED BY DYNAMITE EXPLOSION—BLASTING OPERATIONS—FELLOW-SERVANT—SUPERINTENDENCE—EMPLOYERS' LIABILITY ACT.—In actions under the Employers' Liability Act, for injuries to plaintiffs, two employees engaged in blasting rock on defendant's premises, caused by an explosion of dynamite while plaintiffs were removing the tamping from certain holes, it was *held* that the evidence did not justify the jury in finding that the person who superintended the blasting and was engaged in manual labor with the other employees, was a person whose principal duty was that of superintendence within the meaning of the statute of 1887, c. 270, section 1, clause 2 (1).

It was also held that there was no evidence of personal negligence on the part of defendant, and that if there was any negligence it was that of a fellow-servant.

Two actions of tort, for personal injuries occasioned to the plaintiffs respectively, while in the defendant's employ; the

1. *Blasting explosion—Superintendent*—Statute 1887, chapter 270, section 1.—In *MALCOLM v. FULLER*, 152 Mass. 160 (September, 1890), tort under the Statute of 1887, chapter 270, section 1, clause 2, for personal injuries sustained by a blasting explosion in defendant's quarry where plaintiff was at work, defendant's exceptions on verdict returned for plaintiff were *overruled*. The negligence alleged was that of one Stewart, who was defendant's superintendent. The evidence on the question of superintendence was conflicting but the court held that the evidence was sufficient to justify a finding by the jury that Stewart was the general superintendent of de-

fendant's quarry, and exercised the duties of superintendence within the meaning of the statute. Opinion rendered by W. ALLEN, J.

Dynamite explosion—Blasting operations—Special exploder—"Ways, works and machinery"—*Superintendence*—Statute 1887, chapter 270, section 1.—In *SHEA v. WELLINGTON*, 163 Mass. 364 (April, 1895), tort, for personal injuries sustained by plaintiff, while blasting in defendant's quarry, an explosion of dynamite taking place in a drill-hole which he was loading, plaintiff alleged exceptions to verdict directed for defendant. The declaration contained three counts, the first at common law and the other two under the Employers'

declaration in each case containing counts under the Employers' Liability Act, Statute 1887, c. 270, and also at common law. The cases were tried together in the Superior Court, Suffolk, before Richardson, J., and it appeared that defendant was engaged in blasting a ledge of rock on his premises by means of dynamite exploded by electricity in deep holes drilled by a steam drill in the top of the ledge, and employed one McDonald as superintendent of the blasting; that one Lyons had charge of the work at the base of the ledge, which consisted of breaking up the large pieces of rock into small stones, either by hand drilling and blasts of powder or by sledge-hammers, loading them on teams, and carting them away; and that, while the plaintiffs were engaged, by means of a churn-drill, in removing the tamping from one of the deep holes, an explosion of dynamite occurred therein, and caused the injuries complained of.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. A note to the official report of the case states that the instructions requested and refused were as follows: "1. There is no evidence which will authorize a verdict for the plaintiff in either case. * * * 3. There is no evidence of negligence on the part of the defendant in the selection and employment of a superintendent, or of workmen employed on this work, which contributed to cause the accident. 4. There is no evidence of personal negligence on the part of the defendant in reference to the accident which

Liability Act, Statute 1887, chapter 270, section 1, clauses 1 and 2. It appeared that the method of blasting was to insert in the hole a dynamite cartridge, and an exploder which was discharged by electricity. The exploders used were the kind known as the Victor, a kind conceded to be as good as any made. They were sold by the manufacturers in the open market. Defendant bought these exploders, sold them to others and used them in his own quarry. The making of exploders is a business in itself, requiring skill and technical knowledge, and special machinery and appliances. They are never made by quarrymen. Plaintiff alleged a defect

in the exploders. The court discussed the evidence on this point, and held that defendant was not responsible for latent defects. The court also held that the exploder was not a part of defendant's "ways, works or machinery" within the meaning of the statute, it being an article of merchandise bought to be used and instantly consumed in producing an explosion. The question of superintendence was also passed upon and it was held that defendant's superintendent was not negligent in failing to discover or warn against dangers of which he was not bound to know. Opinion by KNOWLTON, J.

contributed to cause it. 5. There is no evidence that McDonald was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of McDonald."

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

R. M. MORSE (C. G. KEYES and C. D. KEYES, with him), for defendant.

W. H. BROWN, for plaintiff O'Neil.

F. N. NAY, for plaintiff Earley.

Lathrop, J.—The first request for instructions we pass for the present, as it depends in part upon other requests which we shall consider at length.

The third request, we are of opinion, should have been given. An examination of the evidence shows no negligence on the part of the defendant in the selection or employment of a superintendent or workmen which contributed to the accident. There was no evidence of negligence in employing McDonald, and it is now conceded that no claim was made at the trial that he was incompetent. As to the employment of Lyons there was no evidence that he was incompetent to have charge of any part of the work. The testimony as to his competency comes from the cross-examination of himself, in which, while he admitted that he had never done any wiring of holes which were loaded with dynamite, and had not had charge of deep drilling and dynamite blasting with electricity, he also testified that he knew how it ought to be done.

The fourth request should also have been given. We find no evidence of personal negligence on the part of the defendant in reference to the accident. It was not negligence to request McDonald and Earley to begin the work of blasting at five o'clock in the morning, nor to send McDonald to sharpen drills when all concerned supposed that the charge in the hole, from which he and Earley were removing the tamping, had been exploded, the defendant having no knowledge which should have led him to suppose that it was possible that the hole had not been fired; nor was it negligent for him to send O'Neil to assist in manipulating the churn-drill, which was too heavy for one man to work alone. In these matters he acted as any prudent man would act under the circumstances, there being nothing to indicate to him that any explosion could be caused by the removal of the tamping. McDonald's unwill-

ingness to leave the work of removing the tamping which he was engaged on with Earley when the defendant asked him to sharpen drills does not appear to have been for any reason except to get the special work of blasting these two holes finished as soon as possible, and there is nothing in the evidence to indicate that the defendant supposed, or ought to have known, that McDonald's remaining at the work of removing the tamping was of importance to the safety of any one.

While the fifth request does not follow the words of the statute, the question which has been argued, and which was doubtless intended to be covered by it, is covered by the first request, and we proceed to consider whether there was any evidence which would warrant the jury in finding that McDonald was a person in the service of the defendant intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, within the meaning of these words in the Statute of 1887, c. 270, § 1, clause 2. That he was intrusted with, and was exercising the duty of, superintending the blasting, might properly have been found by the jury. It clearly was not his sole duty. Can it be said that it was his principal duty? On the evidence in the case put in by the plaintiffs, it is clear that he worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labor. One of the witnesses testified: "Sharpening the tools occupied part of his time, and he attended to the fire to make the steam. He spent most of the time in sharpening the tools and keeping up steam. Whenever the steam drill was going he had to keep the steel sharp; and if the drill would not be running he would have leisure to come out on the ledge and talk and see what was necessary to be done; but most of the time he was working, sharpening tools, keeping up steam, and coming out to place these holes." There was also other evidence that his manual labor occupied most of his time, and there was no contradiction as to this.

In a sense it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superin-

tendence should not be considered a fellow-servant with a person injured, there would have been no need of the words "whose sole or principal duty is that of superintendence." These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it can not be said of a person who works at manual labor to the extent shown in this case that his principal duty is that of superintendence. See *Cashman v. Chase*, 156 Mass. 342; *Shepard v. Boston & Me. R. R.*, 158 Mass. 174; *O'Brien v. Rideout*, 161 Mass. 170; *Dowd v. Boston & A. R. R.*, 162 Mass. 185.

In *Malcolm v. Fuller*, 152 Mass. 160, the evidence was conflicting as to the work done by the alleged superintendent, and the case, therefore, was left to the jury. In the cases at bar, we have considered only the evidence for the plaintiffs.

If the evidence in the case shows anything more than a pure accident, it shows negligence on the part of McDonald, who, as his principal duty was not that of superintendence, was but a fellow-workman with the plaintiffs.

On these considerations it follows that the defendant was entitled to have the first instruction requested given, which was in substance that the jury would not be authorized to find a verdict for the plaintiff in either case. It is unnecessary to consider the other instructions requested.

Exceptions sustained.

STAGING ACCIDENT — DEFECT — INSTRUCTION — MASTER LIABLE — NOTICE OF INJURY — STATUTE OF 1887, C. 270.—In **DROMMIE v. HOGAN; SMITH v. HOGAN; RIGNEY v. HOGAN; BUCHANAN v. HOGAN**, and **CROWLEY v. HOGAN**, 153 Mass. 29 (*January, 1891*), five actions of tort, under the Statute of 1887, c. 270, for personal injuries sustained by the plaintiffs, while in defendant's employ, by the fall of a staging, verdict for plaintiff in each case was sustained and defendant's exceptions overruled. The five cases were tried together. The opinion by the Supreme Court was delivered by W. ALLEN, J., and states the case as follows:

If the words "by reason of a defective or insufficient staging, and the fall of the staging," were an insufficient statement of the cause of each plaintiff's injury in the notice given to the defendant, which we do not decide, there was evidence properly submitted to the jury that there was no intention to mislead, and that the defendant was not in fact misled thereby.

The prayer for a ruling that, if the fall of the staging was caused

by a stone dropped upon it by either of the plaintiffs or their fellow-servants, subjecting it to unusual and extraordinary strain, which was not reasonably to be expected, the plaintiffs could not recover, was properly refused. The only evidence in regard to the dropping of a stone was the testimony of the defendant that Drommie, one of the plaintiffs, said to him, Buchanan "called me [Drommie] to lift the stone and we got the stone so high [showing], and we let the stone fall down." There was no other evidence that a stone fell, and this testimony was denied by Drommie. There was no evidence that a stone fell as against any of the plaintiffs except Drommie, and the prayer for a ruling in all the cases was, for that reason, properly refused. If the prayer related to Drommie's case alone, we think that the ruling asked, so far as it was correct, was sufficiently given in the instructions to the jury. Under the instructions given, the jury must have found in Drommie's case that the staging was defective, that the defect caused it to fall, whereby the plaintiffs were injured, and that no negligence of the plaintiff, or of a fellow-servant, was a contributing cause. The instructions given required the jury to find for the defendant if they found that the fall of the stone was the sole cause of the giving way of the staging, or if it was a contributing cause with the defect, and was by the fault of the plaintiff, or of his fellow-servants. Construed as a request for a ruling that, if the dropping of a stone was the sole cause of the fall of the staging, the plaintiffs could not recover, the ruling was made in substance and sufficiently; construed as a request for a ruling that, if the dropping of a stone was a contributing cause of the injury and was a pure accident, the plaintiffs could not recover, the prayer was properly refused. In this aspect, the degree of the strain upon the staging caused by the stone is immaterial.

Upon the questions whether the staging was defective, and whether the defect caused its fall, the degree of force and pressure under which it gave way would be material; but after it is found that the staging was defective, and that the defect caused it to fall, and that an accidental strain was a contributing cause, the force and violence of that strain are immaterial; it could do no more than contribute to the injury, and the degree of contribution cannot be apportioned. The strain, however extraordinary, was the result of an accident which happened, and was liable to happen, in the ordinary use of the staging. It would have been manifest error to instruct the jury, that, if they found that the staging was defective through the negligence of the defendant, and that that defect caused it to fall, and that no negligence of the plaintiffs or their fellow-servants contributed thereto, yet the plaintiffs could not recover if the accidental dropping of a stone upon the staging was a contributing cause of its fall. The circumstances did not call for particular, full, or explicit instructions in regard to the effect of the evidence in Drommie's case.

which tended to show that a stone fell upon the staging. No instructions were asked as to his case alone. The instructions given upon the five cases tried together contained in substance all that could have properly been given in Drommie's case, and there was no request to give instructions especially applicable to his case.

No other exception has been argued, and we find no error in any ruling or refusal to rule of the court. Exceptions overruled.

ADASKEN, ADM'X v. GILBERT.

Supreme Judicial Court, Massachusetts, March, 1896.

[Reported in 165 Mass. 443.]

PAINTER FALLING FROM STAGING—DEFECTIVE ROPE — EVIDENCE — FELLOW-SERVANT.—Where an employee, a painter in defendant's employ, was engaged with two other persons in painting the outside of a large building, being at work on a staging consisting of a ladder thirty feet long with boards placed along the rungs, the ladder being held by three falls of rope attached to the roof of the building by a hook, and in some manner one of the ropes either broke or slipped, causing the staging to swing outward and the employee fell to the ground and was fatally injured, and there was no evidence that defendant did not furnish sufficient ropes, it was *held* that the mere breaking of the rope was not enough to show that defendant was guilty of negligence. *Held*, also, that as the making of the staging was intrusted to the injured employee and his fellow-servants, the defendant would not be liable if there was any defect in the rope (1).

STAGING—"WAYS, WORKS OR MACHINERY"—EMPLOYERS' LIABILITY ACT.—A temporary staging of the kind described in this case is not within the term "ways, works or machinery" in the statute of 1887, c. 270, section 1.

SUPERINTENDENCE—STATUTE.—Where another employee was employed on the same job with the injured employee and another, as a common painter, receiving the same pay as the two men, and doing the same work, the mere fact that he gave directions as to lowering the stage did not constitute him a superintendent within the meaning of the statute of 1887, c. 270, section 1.

1. *Staging accident—Employee injured—Fellow-servant—Statute of 1887, chapter 270, section 1, clause 1.*—In *ASHLEY v. HART ET AL.*, 147 Mass. 573 (October, 1888), plaintiff, a journeyman painter, working with another painter, injured by the giving way of the fastenings of the staging upon which they were work-

ing, plaintiff being precipitated to the ground, judgment sustaining defendant's demurrer to the declaration on the ground that the injury was the result of the negligence of a fellow-servant was *affirmed*. The Supreme Court said: "The Statute of 1887, chapter 270, section 1, clause 1, gives a right of action to an employee, being

TORT, for personal injuries occasioned to the plaintiff's intestate, Adolph Adasken, and for causing his death while in the defendant's employ. Trial in the Superior Court, Hampden, before Dewey, J., who, at the close of the plaintiff's evidence, at the defendant's request, directed the jury to return a verdict for the defendant, and the plaintiff alleged exceptions. The facts appear in the opinion. *Exceptions overruled.*

D. E. LEARY, for plaintiff.

W. H. BROOKS and W. HAMILTON, for defendant.

Lathrop, J.—There are four counts in the declaration; one at common law, and the others either under the Statute of 1887, c. 270, or under that Act as amended by the Statutes of 1892, c. 260, § 1. No question of pleading is raised, nor was the plaintiff required to elect under which count she would proceed. The question before us is whether there was any

himself in the exercise of due care, who is injured by "any defect in the condition of the ways, works or machinery connected with or used in the business of the employer," which arose from the negligence of the employer, or of any person in his service who is intrusted with the duty of seeing that the ways, works or machinery were in proper condition. This so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool, or appliance which is furnished for his use, although such defect arose from the negligence of a fellow servant whose duty it was to see that the machine, tool or appliance was in proper condition. But it does not give a right of action against the employer for the negligence of a fellow-servant in handling or using a machine, tool or appliance which is itself in a proper condition. The declaration in this case does not allege any defect in the condition of the movable stage furnished by the defendant for the use of the plaintiff and his fellow-servant Kempton. It does not directly, or by a fair implication, allege that Kempton, any

more than the plaintiff, was intrusted with the duty of seeing that either particular end of the stage was securely fastened to the house. It alleges, that, according to the usual manner of managing such stages, Kempton had charge of lowering one end and the plaintiff of lowering the other, and that Kempton neglected to fasten his end securely. This is simply an allegation of negligence in a fellow-servant in handling or using a sufficient and proper stage, and does not state a case which falls within the statute. Judgment affirmed."

Fall from staging—Negligence of fellow-servant—Statute 1887, chapter 270, section 1.—In *O'CONNOR v. NEAL AND ANOTHER*, 153 Mass. 281 (February, 1891), verdict directed for defendant was *sustained*, the syllabus to the official report stating the case as follows: "An experienced mason was directed to point the windows in a room, and proceeded to do so, using a staging made of planks resting on barrels placed on end, both of them sound and furnished by the builders employing him. While at work in the afternoon upon a window, standing upon the sill, a laborer also in their

evidence on which the plaintiff was entitled to go to the jury, the presiding justice having, at the close of the evidence for the plaintiff, directed a verdict for the defendant.

The exceptions state that the plaintiff's intestate was a painter, and had learned his trade in Russia, and had worked at it in Russia, in Connecticut, and in Springfield. In the last-named place he had worked for the defendant three seasons or more. At the time of the accident he was engaged in painting the outside of a large building in Springfield, having worked on the job about two weeks. He worked with two other persons on a staging which consisted of a ladder about thirty feet long, which had boards placed along the rungs. The ladder was held by three falls of rope, each attached to the roof of the building by a hook. There was a fall at each end of the ladder and one in the centre. The staging was raised and lowered by means of ropes running through pulleys in these

employ suggested to him that he needed a staging, and offered to arrange it, and did so upon his saying, "All right." The staging tipped as he stepped on it, and he fell through the window to the sidewalk below, receiving injuries. In an action therefor against the builders, his evidence tended to show that he had pointed windows in many buildings with like stagings; that it was customary for a mason to build his inside staging, a laborer doing the work; that one of the builders came into the room casually during the forenoon, and another just before the accident; and that the accident occurred through the laborer's negligence in placing one of the barrels on a pile of rubbish, so that it rested unevenly on the floor. Held, that the plaintiff could not recover either at common law or under the Employers' Liability Act." Opinion by MORTON, J.

Employee falling from staging—Master not liable—Statute 1887, chapter 270, section 1.—In *KENNEDY v. SPRING*, 160 Mass. 203 (November, 1893), tort for personal injuries sustained by plaintiff while in defend-

ant's employ, by reason of his falling from a staging upon the roof of a house, which staging was put up for the purpose of building a chimney, plaintiff's exceptions to verdict for defendant were overruled, it being held that there was no evidence to warrant a verdict for plaintiff. The second count of the declaration was under the Statute of 1887, chapter 270, section 1, clause 1, but the plaintiff being required to elect upon which count he would proceed, and proceeding under the common-law count, the question was whether there was evidence to make out a case at common law.

Defective staging—Master liable—Ways, works and machinery—Statute 1887, chapter 270, section 1.—In *PRENDIBLE v. CONNECTICUT RIVER M'FG Co.*, 160 Mass. 131 (November, 1893), tort for personal injuries sustained by plaintiff, while in the employ of defendant, by the fall of a staging upon which he was at work, defendant's exceptions on verdict rendered for plaintiff overruled. The Supreme Court (per KNOWLTON, J.) said: "The plaintiff was permitted to go to the jury on two counts under

falls. There were also three ropes, each three-eighths of an inch thick, running from the ladder to the building, which served to steady it, a rope being at each end of the ladder and one in the middle.

The evidence leaves it very uncertain as to how the accident happened. There was some evidence that the rope which fastened the end of the ladder on which the intestate was sitting to the building, either broke or slipped, and that the staging swung outward, and the intestate fell to the ground, and received injuries from which he soon afterwards died. There was other evidence that the staging was about to be lowered, and that the rope at the end of the ladder was not fast to the building, when the intestate rose up, and lost his balance and fell over.

Taking the view most favorable to the plaintiff, and assuming that the rope broke, or that the knot slipped, we are of opinion that enough has not been shown to entitle the plaintiff to recover.

the Employers' Liability Act (St. 1887, c. 270), one alleging an injury by reason of a defect in the ways, works or machinery of the defendant, and the other an injury received by reason of the negligence of a person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence. In regard to each count, the defendant asked for a ruling that there was no evidence to support it; and the principal exceptions arise from the refusal of the presiding justice to give either of these rulings. The plaintiff was injured by the fall of a staging on which he was working. This staging was erected by the side of a wood pile for the purpose of enabling the workmen to pile the wood higher. It was about fifteen feet high, twenty feet long, and five feet wide, and it was taken down and put up from time to time in different places, and was intended to be used from four days to a week at a time in each place where it was erected. We think it

was competent for the jury to find that the staging when erected was a part of the defendant's ways, works or machinery." * * *

Employees injured by fall of staging caused by falling object—Master liable—*Statute 1887, chapter 270, section 1.*—In *GIBSON v. SULLIVAN*, and *TRIPP v. SULLIVAN*, 164 Mass. 557 (November, 1895), two actions of tort, for personal injuries occasioned to the plaintiffs respectively, while in defendant's employ as masons, by the fall, upon a staging on which they were standing while at work, of certain terra-cotta brackets and copings which projected from the wall of a building in process of erection by defendant, the weight of the brackets and copings breaking the staging and precipitating plaintiffs to the ground (the declaration in each case containing counts at common law and under the Employers' Liability Act), verdict returned for plaintiff in each case was sustained, and defendant's exceptions overruled. Opinion by BARKER, J.

The testimony is uncontradicted that the three men put the staging together, and each man selected his own rope; that the rope which broke or slipped was a new one, and appeared plenty strong enough for that place. There is no evidence that the defendant did not furnish a sufficient supply of proper ropes at the place from which these were taken. *Carroll v. Western Union Telegraph Co.*, 160 Mass. 152, and cases cited. Under these circumstances, the mere fact that the rope broke is not enough to show that the defendant was guilty of negligence. There was no evidence of any defect in it for which he ought to be held answerable. *Allen v. Smith Iron Co.*, 160 Mass. 557; *Kalleck v. Deering*, 161 Mass. 469.

As there was no evidence that the defendant undertook to furnish the staging as a completed structure, but intrusted the making of it to the intestate and his fellow-servants, the defendant is not liable if there was any defect in the rope. *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Hoppin v. Worcester*, 140 Mass. 222; *McKinnon v. Norcross*, 148 Mass. 533; *Kennedy v. Spring*, 160 Mass. 203 (1).

On the count at common law we are, therefore, of opinion that the plaintiff is not entitled to recover.

The counts under the Statutes of 1887 proceed upon two grounds; first, that the staging was a part of the ways, works, or machinery; and secondly, that one Hosford was a superintendent.

A temporary staging of this kind is not within the term "ways, works, or machinery," in the statute. *Lynch v. Allyn*, 160 Mass. 248; *Burns v. Washburn*, 160 Mass. 457; *Carroll v. Willcutt*, 163 Mass. 221 (2).

1. The cases cited in the opinion in the case at bar will be found reported with the Massachusetts cases in this volume of AM. NEG. CAS.

2. *Fall of staging—Ways, works and machinery—Statute 1887, chapter 270, section 1.*—In *BURNS v. WASHBURN*, *MURPHY v. WASHBURN*, and *BUTTMORE v. WASHBURN*, 160 Mass. 457 (January, 1894), actions brought under the Employers' Liability Act, the plaintiff's exceptions on verdict rendered for defendant were

overruled. LATHROP, J., in his opinion, stated the case as follows: "The plaintiffs were what are known as masons' tenders, and were at work on a staging put up for the purpose of erecting a building on land belonging to the city of Brockton. The defendant was their employer, and was the contractor for doing the work. The staging fell, and the plaintiffs were injured. These actions are brought under the statute of 1887, chapter 270. The first count in each case, we assume, was intended to be

The remaining ground upon which the plaintiff seeks to recover is that there was negligence on the part of Hosford, and that he was a person intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence. We need not stop to consider whether there was any evidence of negligence on Hosford's part which contributed to the accident, nor whether the directions he gave as to lowering the staging, and on the day before the accident telling a friend of the intestate, who was talking with him, to stop, can be called superintendence, as we find no evidence which would have warranted the jury in finding that his sole or principal duty was that of superintendence. So far as the evidence goes it shows that Hosford was employed on the job as a common painter, receiving the same pay as the other two men and doing the same work. *Cashman v. Chase*, 156 Mass. 342; *Shepard v. Boston & Maine R. R.*, 158 Mass. 174; *O'Brien v. Rideout*, 161 Mass. 170; *Dowd v. Boston & Albany R. R.*, 162 Mass. 185; *O'Neil v. O'Leary*, 164 Mass. 387.

Exceptions overruled.

Liability of municipal corporations for injuries to employees, under the Statute of 1887, chapter 270.

Employees injured by cave-in of trenches — City liable.

In *CONNOLLY v. CITY OF WALTHAM*, 156 Mass. 368 (May, 1892), tort, under the statute 1887, c. 270, for injuries to a city employee caused by the cave-in of a side of the trench in which plaintiff was working, verdict for plaintiff was sustained, and defendant's exceptions *overruled*.

In *NORTON v. CITY OF NEW BEDFORD*, 166 Mass. 48 (May, 1896), tort, for personal injuries occasioned to the plaintiff by the caving-in of a sewer trench in which he was working, brought under the Employers' Liability Act, the negligence alleged being that of defendant's superintendent and

framed under section 1, clause 1, and the question is whether a staging of the kind mentioned in the exceptions can be said to be a part of the defendant's ways or works. We are of opinion that these words in the statute refer to ways or works of a permanent character, such as are connected with or used in the business of an employer; and that they do not apply to a temporary structure, like the staging in question, erected on the land of a third person. See *Lynch v.*

Allyn, 160 Mass. 248, and cases cited." * * *

See, also *CARROLL v. WILLCUTT*, 163 Mass. 221 (March, 1895), where plaintiff was injured in a staging accident. It was held that the plaintiff could not recover upon the first count of his declaration, under the Employers' Liability Act, there being no defect in the material, plan or construction of the staging, and the presence of the stone upon it was not a defect in the "ways, works or machinery."

that of an acting superintendent, judgment was rendered for plaintiff on the verdict returned for him in the Superior Court.

In *HENNESSY v. CITY OF BOSTON*, 161 Mass. 502 (June, 1894), tort, under statute 1887, c. 270, for personal injuries sustained by plaintiff, while in employ of defendant, by the caving-in of the side of a sewer trench in which he was at work, plaintiff's exceptions to direction of verdict for defendant in the Suffolk Superior Court, were *sustained*. The court held that the questions of the foreman's negligence and whether plaintiff was in the exercise of due care should have been submitted to the jury.

Employee thrown from gravel car — City liable.

In *COUGHLAN v. CITY OF CAMBRIDGE*, 166 Mass. 268 (May, 1896), tort, for personal injuries sustained by plaintiff while in the employ of the city, caused by being thrown from a loaded gravel car, defendant's exceptions to verdict returned for plaintiff were overruled. Among other rulings it was held that the Employers' Liability Act, statute 1887, c. 270, applied to cities and towns.

When city not liable under the Employers' Liability Act.

Employee stringing wires injured by breaking of pole.

In *PETTINGELL v. CITY OF CHELSEA*, 161 Mass. 368 (May, 1894), it was held (as per syllabus to the official report) that: "A city is not liable, at common law or under statute 1887, c. 270, to a person in its employ who, in the exercise of due care, is injured by the breaking of a pole to which were attached the wires of the fire signal system of the city, although the pole broke because it was 'negligently constructed, cared for, maintained, and placed' in its position." Opinion by FIELD, CH. J.

Employee fatally injured by cave-in of walls of trench — "Ways, works or machinery" — Statute 1887, chapter 270, section 1.

In *CONROY v. INHABITANTS OF CLINTON*, 158 Mass. 318 (March, 1893), plaintiff's exceptions on verdict directed for defendant in the Worcester Superior Court were overruled, the facts being stated in the opinion by LATHROP, J., as follows:

"The plaintiff is the widow of Anthony Conroy, and brings this action, under the statute of 1887, c. 270, section 2, for his death, he being killed on November 6, 1890, while laying pipe in the bottom of a sewer trench, which was being constructed by the defendant. The immediate cause of the death was the caving-in of the walls of the trench. The declaration contains four counts. The first and third are based upon clause 1 of section 1 of the statute of 1887, c. 270, and the second and fourth upon clause 2 of the same statute. The first and third differ only in this respect, that one alleges that Conroy was instantly killed, and the other that he died without conscious suffering. The same is true of the second and fourth counts.

"The defects 'in the condition of the ways, works or machinery,' the first count alleges, 'consisted in using decayed, rotten, unsafe, and unsuitable planks and timbers for bracing up the sides of the trench of said sewer; that the said planks and timber used as aforesaid were placed so wide a distance apart on the sides of the trench of said sewer as to be totally inadequate and insufficient to sustain and keep in place the sides of the

trench aforesaid; and that at the time said Conroy was killed the bracing had been negligently and carelessly suffered to remain in place a long time, to wit, the space of twenty-four hours, without being tightened or fixed, or made secure, and in consequence thereof had become loose, unsafe, and utterly inadequate to sustain and keep in place the sides of the said trench."

"The second count alleges that the negligence of the superintendent 'consisted in directing and ordering said Anthony Conroy to work at the bottom of a trench of a certain sewer, etc.,' and describes the condition of the trench as in the first count.

"At the close of the evidence, the presiding judge required the plaintiff to elect upon which counts she would proceed, to which the plaintiff excepted. She then elected to proceed upon the first and third counts. The judge thereupon ruled that the plaintiff had failed to make out her case; and directed a verdict for the defendant. The case comes before us on the plaintiff's exceptions to these rulings and directions, and upon a report of the evidence." * * *

The court said that it was a question not free from difficulty whether the case came within clause 1 of section 1 of the statute of 1887, c. 270. As to requiring plaintiff to elect on which counts she would proceed, it was held that plaintiff was not injured thereby.

Employee injured by fall of derrick in sewer — Notice of injury — Statute 1887, c. 270, section 3.

In *DRISCOLL v. CITY OF FALL RIVER*, 163 Mass. 105 (February, 1895), city employee working in sewer injured by fall of derrick, incompetency of defendant's foreman being alleged, plaintiff's exceptions on verdict returned for defendant were overruled. The Supreme Court (per MORTON, J.) rendered the following opinion:

"It is evident that the question which was objected to called for an answer as to the reputation of the foreman amongst the gang with which the witness had been working from three to four days to a week, and whose number did not appear, nor how long they had worked under the foreman. A general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency. But the reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed. *Monahan v. Worcester*, 150 Mass. 439; *Gilman v. Eastern Railroad*, 13 Allen, 433, 444, 15 Am. Neg. Cas. 426, *ante*; *Whitcher v. Shattuck*, 3 Allen, 319, 321.

"We assume that the two papers which are relied on as being the notice were given to the defendant, though the bill of exceptions does not state that they were, nor where nor to what officer; but we do not think that they constituted a sufficient notice. The first paper is headed 'John Driscoll,' and appears to be a record of the events immediately preceding and connected with the accident to him. The second paper is a description over the signature of a physician of the injuries sustained by John Driscoll as the result of the accident. We may conjecture that the two papers were intended to be a notice to the defendant of the time, place, and cause

of the injury, in accordance with the statute. But they neither purport to be given in behalf of the plaintiff, nor to indicate that he had any claim against the city. The notices required by the statute are not to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim against the city or town, and are given on behalf of the person who brings the suit. *Kenady v. Lawrence*, 128 Mass. 318; St. 1887, c. 270, sec. 3, and amendments. We think that the notice in this case is defective in both particulars. Exceptions overruled."

MOYNIHAN v. HILLS COMPANY.

Supreme Judicial Court, Massachusetts, 1888.

[Reported in 146 Mass. 586.]

EMPLOYEE INJURED BY HAT-PRESSING MACHINE — DEFECTIVE MACHINERY — FELLOW-SERVANT — SUPERINTENDENT — VICE PRINCIPAL — INSTRUCTION.—In an action to recover damages for personal injuries sustained by plaintiff, an employee of defendant corporation, while pressing hats upon a machine, the rod sustaining the weights on the machine breaking and the dome falling upon plaintiff's hand and wrist, the machinery, being in charge of a competent and skilful mechanic, the trial judge charged the jury that it was a question for them to decide whether such mechanic was negligent, and if so that his negligence would not be that of a fellow-servant, but of the defendant, for which the latter would be liable if such negligence was the sole cause of the injury, to which instruction the defendant excepted. *Held*, that such instruction was proper, as the evidence showed that defendant left the entire supervision of the machinery to its head machinist, and the latter represented the defendant as to its duty to furnish plaintiff with safe machinery and appliances, and for negligence of such mechanic in this respect the defendant was liable.

TORT, for personal injuries sustained by the plaintiff, on May 10, 1884, while in the defendant's employment. At the trial in the Superior Court (Hampshire), before Barker, J., there was evidence tending to prove the following facts:

"The defendant, a corporation engaged in the business of manufacturing and finishing straw hats, in 1880, purchased, upon the recommendation of its superintendent, new machinery, to be operated by steam power, for pressing the crowns of hats, from a manufacturer of such machinery in Norwalk, Connecticut:

"The defendant's officers were not mechanics, and had no practical knowledge of machinery. Each of these machines was constructed with a ball suspended upon a rod, and weighing

one hundred and thirteen pounds, which acted as a counterbalance to that portion of it called the dome, by which the pressing was done, and which weighed about six hundred pounds. In 1882 or 1883 the defendant caused four of the machines to be rebuilt, so as to press the brims of hats as well as the crowns at the same time. The dome in each was made larger and heavier in order to accomplish this, and the counterbalancing weight was increased by placing another ball of equal weight upon the rod already in use in each machine. Mitchell Marcil, a competent and skilful machinist, had charge of the defendant's machinery, and was given the entire charge by it of the reconstruction of the four machines, having for that purpose three assistants. The machines were set upon a bench, through which the weights passed vertically while they were in operation. The weights in passing up and down acquired a pendulum motion, the weights sometimes striking the side of the building and the floor, wearing away a portion of each, and the rods striking certain iron pipes along the side of the building. The blows so received by the weights and the rods themselves had a tendency to cause a rod of iron so situated to take on a crystalline structure and become brittle, the proper method of preventing which was by annealing the rod from time to time.

"On May 10, 1884, the plaintiff, who was twenty-seven years old, was pressing hats upon one of the reconstructed machines in a usual and proper manner, when the rod sustaining the weights on it broke, and let the dome down upon the plaintiff's hand and wrist, crushing the bones, so that it became necessary to amputate the hand. Prior to the accident, the plaintiff had worked upon the different hat-pressing machines, more or less for three years, and had some knowledge of their construction and operation, and the danger attending the use of them, but he had not worked upon the machine in question for more than a month, and had no knowledge that it was out of repair. The rod broke at a point that was slightly discolored, as if it were not a fresh break, and as if there had been a flaw there. The rods in the four machines were examined, at the time of the reconstruction by an assistant of Marcil, and they were examined again in January, 1883, when an extra nut was put upon each rod below the weights; but there was no inspection of them at any time by Marcil.

"Albion F. Bemis testified that he was the defendant's sec-

retary and treasurer, its superintendent, and a director; that there were three directors, neither of whom was a machinist; that he had no practical knowledge of the use of tools and machinery; that he had not examined the rod prior to the accident; that Marcil was the defendant's general machinist, and had charge of the machinery; that he was called upon to do any work that required a machinist, and was directed to see what needed to be done, and to do it; that supplies, tools, and proper material were furnished to keep all these machines in proper condition; that Marcil 'had charge of the building these machines, fixing them over;' that 'the matter of changing them over was intrusted entirely to' Marcil; that Marcil, 'was left to do the fitting up of that machine on his own judgment.' As to the broken rod he testified as follows: 'I saw both parts where it broke; I saw it again in the office before I sent Walker, the clerk, to the blacksmith shop, relative to getting another rod to keep the press running; as I remember it, it was a break nearly straight across; it appeared to me it was not of equal brightness all the way across, as though there had been a check there, or something of that sort; it broke very nearly square across; as I remember it, there was a slight discoloration there, as though there had been a flaw; it was slightly discolored, as if it was not a fresh break. I don't think it was very noticeable; it was not a black spot, but it appeared to me as though the iron had not freshly parted. * * * My attention was particularly called to the break, but I did not notice anything outside of that; of course I must have looked the rod over at the time, but my attention was mainly directed to the break. I examined each end; it appeared dull or cloudy like; it seemed to me as though there had been a flaw or check there, or something of that sort.'

"Marcil testified that he was the defendant's head machinist; that he had worked as a machinist at different places for about twenty-four years; that he was placed in charge of the defendant's machinery; that the hat-pressing machines were used at first without success, and that he thought that he could make a success of them, and could fix them, and was told so to do; that it took him about four weeks, after he got the castings and various parts, to rebuild the machines, with the assistance of three men; that the balls were placed on the machines to counterbalance the dome; that he never weighed the balls, but

thought that the rods on which they were placed were strong enough; that the rods looked all alike to him, and he thought they were safe; that at the time he set up the machines he noticed the rod which broke only long enough to put on the balls and nuts; that he must have handled the rod at that time; that he saw no appearance of any defect whatever; and that none of the rods in the other machines had broken that he knew of. On cross-examination he testified: 'I did not put this machine together the first time; I did not notice this rod at any time; I did not inspect it; I did not accustom myself to look this machine over, any more than when I got it done I thought it was all right; when I got it done I did not look at it again until the time of the accident; I do not remember ever inspecting that rod from the time it was set up until the day Moynihan was hurt; I do not remember having any instruction from Bemis about it in any way whatever; I do not believe I ever noticed that hole in the floor until after Moynihan was hurt; I do not remember as I ever noticed about the flaw until after Moynihan was hurt; I do not remember as I ever noticed the worn spot on the side of the rod; I do not remember as I ever noticed the wearing on the floor or on the water-pipe; I do not remember about the wall; I never was instructed to go through that room and inspect the machines, only when they come to tell me something give out.'

"The defendant asked the judge to rule, that on the evidence the plaintiff was not entitled to recover; that there was no evidence that Marcil was not a competent man for the defendant to employ and intrust with the reconstruction and repair of the machine; that the defendant was not negligent in so employing him and so intrusting him; and that if the accident happened by reason of the negligence of Marcil, the plaintiff could not recover.

"The judge declined so to rule, but instructed the jury that there was evidence tending to show that Marcil was employed by the defendant in order to make repairs and reconstruct the machine; that there was evidence that he was an experienced and skilful mechanic, and no evidence tended to show that he was otherwise; that upon the evidence the defendant was not negligent in intrusting to him the repairs and reconstruction of the machines; that it was a question of fact for them to decide, whether Marcil was negligent in making those repairs and in reconstructing this machine; and that if Marcil was

negligent, then his negligence would not be that of a fellow-servant, but of the defendant, for which the defendant would be answerable if such negligence was the sole cause of the injury.

"The jury returned a verdict for the plaintiff for \$4,125; and the defendant alleged exceptions. The case was argued at the bar in September, 1887, and afterwards was submitted on briefs to all the judges." *Exceptions overruled.*

D. W. BOND and J. I. COOPER, for defendant.

J. C. HAMMOND, for plaintiff.

Knowlton, J.—The defendant's request for a ruling that upon the evidence the plaintiff was not entitled to recover, was rightly refused. There was testimony tending to show that the plaintiff was using the machine in a proper manner, and that he did not know that it was out of repair. This would warrant a finding that he was in the exercise of due care. The fact that the machine broke, in the manner described, from the use for which it was intended, was evidence that it was defective and unsafe, and the fact that the defendant was then using it in its business, if left unexplained, was some evidence of the defendant's negligence. *White v. Boston & Albany R. R.*, 144 Mass. 404, 9 Am. Neg. Cas. 461. But, beyond that, it was proved that the rod which broke was designed to carry one iron ball weighing about 113 pounds, and that under the defendant's direction the machine had been reconstructed, and the rod made to carry two such balls. There was also testimony that it had been subjected to a use which caused the iron in the rod to vibrate while under a strain, and which tended to crystallize it and make it brittle, and that there had been no inspection of it to ascertain its condition for nearly two years before the accident. The defendant's secretary and treasurer, who was also its superintendent and one of its directors, testified that the rod was slightly discolored at the place of the fracture, as if the break was not fresh, and that it appeared to him as if the iron had not freshly parted. Upon this evidence it was for the jury to decide whether or not the defendant was negligent.

The court was also requested to rule that, if the accident happened by reason of negligence of Marcil, the plaintiff could not recover. This ruling was refused, and the jury were instructed that negligence of Marcil in making the repairs and reconstructing the machine would be negligence of the corpo-

ration, for which the corporation would be answerable if it was the sole cause of the injury. The principal question in the case is whether or not this instruction was correct.

The rights of a plaintiff who has been injured by defective machinery of a defendant for whom he was working, depend upon the contract, express or implied, under which he was employed. In making a contract for service, if the business is to be carried on by many persons working together in a factory, the parties naturally contemplate the existence of machinery, tools, and appliances, and the presence of other employees, who will be fellow-servants of him who is contracting to serve. In the absence of an express stipulation the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, so far as the exercise of proper care on his part will secure them, and the servant agrees to assume all the ordinary risks of the business, and among them the risk of injury from negligence of his fellow-servants. This obligation which the master assumes is personal, and pertains to him in his relation to the business as proprietor, and in his relation to the servant as master. It has been repeatedly held that he can not discharge it by delegating the performance of his duty to another. *Ford v. Fitchburg Railroad*, 110 Mass. 240, 15 Am. Neg. Cas. 427, *ante*; *Kelley v. Norcross*, 121 Mass. 508; *Killea v. Faxon*, 125 Mass. 485 (1); *Elmer v. Locke*, 135 Mass. 575, 15 Am. Neg. Cas. 487, *ante*; *Lawless v. Conn. River R. R.*, 136 Mass. 1, 15 Am. Neg. Cas. 436, *ante*; *Flike v. Boston & Albany R. R.*, 53 N. Y. 549; *Hough v. Railway Co.*, 100 U. S. 213. And if he employs

1. *Defective staging — Fellow-servant.*—In *KILLEA v. FAXON AND OTHERS*, 125 Mass., 485 (October, 1878), judgment was rendered for defendants, the case being stated by MORTON, J., as follows: "The defendants were repairing a building belonging to the Quincy Reform Club. For the purposes of this case, we treat them as subject to the same liabilities as if they were the owners of the building. They employed one Higgins, a carpenter, to superintend the whole job. When the time came for putting on the gutters, Faxon, one of the defendants, told Higgins that he

wanted a staging put up, and the staging was erected under the direction of Higgins, who used his own brackets, for the sole purpose of putting on the gutters. Faxon, on the next day, ordered of Loring, a coppersmith, some copper gutters for the building, and directed him to send a man to put them up. Loring sent the plaintiff, and, when he arrived at the building, Faxon was there, and directed him where to go to work. There was no evidence of any negligence, except the negligence of Higgins, in constructing the staging. The question is, whether the relations of the parties

agents or servants to represent him in the performance of this duty, they are to that extent agents or servants for whose conduct he is responsible.

The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow-servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent.

It is obvious that difficult questions arise in cases of this kind in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it, and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a

were such that the defendants are responsible to the plaintiff for such negligence." * * * Held, that defendants were not liable, the negligence, if any, being that of a fellow-servant, the risk of which was assumed by plaintiff as one of the risks of employment.

Fall of staging — Fellow-servant.— In *KELLEY, ADM'X, v. NORCROSS ET AL.*, 121 Mass. 508 (January, 1877), tort against defendants, a firm of contractors engaged in building Trinity church, in Boston, by plaintiff, for injuries to her intestate caused by the fall of a staging and of the stone upon

it, while engaged at work upon said building, verdict directed for defendants was sustained and judgment rendered thereon. The opinion was rendered by DEVENS, J., and the ruling is stated in the syllabus to the official report as follows: "A laborer cannot recover for personal injuries resulting from the falling of a staging upon him, against his employer, although the staging was insufficiently built, if the employer furnished suitable materials therefor, and committed the duty of building the staging to the laborer's fellow-servants, who were skilful workmen."

certain extent, fellow-servants would be employed by the master to do the work in keeping the machinery safe. Work negligently done within that field, if any accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow-servant. It becomes necessary to consider the rights of the parties in such cases. The application, in each particular case, of any general rules which may be laid down will involve a consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe?

First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts applied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow-servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons and supplies them with everything needed for their work.

A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow-servants of the employee, and he must, therefore, be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. And so he is bound to bring to this

department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom in an important particular the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow-servant with his other employees within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable.

There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never have reasonably contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine-shop in a distant city and build it there. His servants in that work would not be fellow-servants with an employee engaged in an entirely different business. And under the doctrine of *respondeat superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis it would be inconsistent with his implied contract to employ fellow-servants of his employee in this work, and he, therefore, could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow-servants with his employees in the business in which it was to be used.

It is believed that the decision in every case in this Commonwealth founded upon alleged negligence of a master in relation to his machinery, tools, or appliances, will be found, upon the view of the facts taken by the court, to be governed by the principles which we have stated. *Elmer v. Locke*, 135 Mass. 575, 15 Am. Neg. Cas. 487, *ante*; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 15 Am. Neg. Cas. 534, *ante*; *Rogers v. Ludlow Manufacturing Co.*, 144 Mass. 198; *Holden v. Fitchburg R. R.*, 129 Mass. 268, 15 Am. Neg. Cas. 433, *ante*; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *McGee v. Boston Cordage Co.*, 139 Mass. 445, 15 Am. Neg. Cas. 534, *ante*;

Arkerson v. Dennison, 117 Mass. 407 (1); *Gilman v. Eastern R. R.*, 10 Allen, 233, and 13 Allen, 433, 15 Am. Neg. Cas. 426, *ante*; *King v. Boston & Worcester R. R.*, 9 Cush. 112, 15 Am. Neg. Cas. 413, *ante*, 129 Mass. 277*n*. See, also, *Northern Pacific R. R. v. Herbert*, 116 U. S. 642; *Benzing v. Steinway*, 101 N. Y. 547.

The facts in this branch of the case at bar are undisputed. The defendant was carrying on the business of manufacturing and finishing straw hats. The plaintiff was injured upon one of the several heavy iron machines operated by steam power,

1. *Employee injured while operating a carding machine — Master liable.*— In *ROGERS v. LUDLOW MANUFACTURING Co.*, 144 Mass. 198 (March, 1887), defendant's exceptions on verdict rendered for plaintiff were *overruled*. Plaintiff's evidence tended to show "that the plaintiff was injured while at work on a carding machine. This machine consists of a large cylinder covered with a strip of wood, called the lag. In this strip card-pins are driven. Back of this cylinder is another called the worker, which works flax or jute into form to pass over the cylinder. This is also covered by a lag. Above the worker and the large cylinder, forward of the worker, and within a foot or two of it, is another cylinder, called the stripper, which is also covered by a lag. The worker more or less frequently gets clogged with jute or the other material used, and has to be picked with a hook to enable it to do good work. The pins get bent or torn out, and have to be supplied, and the lag has to be mended with more or less frequency. At the time the plaintiff was injured he was engaged in picking the worker. The hook got caught, and went into a hole in the lag, and before he could let go of the hook his hand was drawn into the machine, which was in motion, and he sustained the injuries complained of. The lags would not do good work unless kept in repair,

and men were employed to look after them and keep them in repair, either by putting in new pins, or by replacing the old lags with new. When the machine was examined after the accident, holes were found in the lag on the worker, caused by the pins coming out." The Supreme Court (per FIELD, J.) discussed fully the fellow-servant rule, citing numerous cases.

Falling object — Defective appliance.— In *SPICER v. SOUTH BOSTON IRON Co.*, 138 Mass. 426 (January, 1885), tort for personal injuries sustained by plaintiff, while in the employ of the defendant, by the falling of a heavy weight upon his head, which was occasioned by the breaking of an iron hook upon which the weight was hung, the accident occurring in defendant's iron foundry, verdict for plaintiff for \$1,000 was sustained and defendant's exceptions *overruled*.

Fall of staging.— In *ARKERSON v. DENNISON*, 117 Mass. 407 (March, 1875), employee injured by the fall of a staging upon which he was at work for defendant, the master was held liable for the injury. The plaintiff was employed as a bricklayer, and while walking upon the third story of a building in course of construction, the scaffold broke and fell and plaintiff was thrown to the ground and his leg was broken.

manufactured for the defendant in Norwalk, Connecticut. The defendant reconstructed this and three other machines, so as to make them press the brim of hats as well as the crown, they having originally been built to press the crown only. This very materially changed the machine. Mitchell Marcil, who had charge of the work, testified that, after they got the castings and everything ready to put on it, it took him and three other men about four weeks to rebuild it.

None of the officers of the defendant corporation were mechanics, or men having practical knowledge of machinery. They left the reconstruction of the machines entirely to Marcil, to be done upon his own judgment. He also had charge of the machines all the time, and was directed to see what was needed to be done, and to do it. Assuming that this was a machine upon which the defendant might, under its implied contract with the plaintiff, employ his fellow-servants in the work of reconstruction, it is evident upon the undisputed testimony that Marcil, while he did some work appropriate for an ordinary servant, was, in relation to the reconstruction and to the charge of this machine, set to do the master's duty. The defendant's officers were personally incompetent to use that skill and judgment in regard to keeping these machines safe which the law required of the defendant, and they left to Marcil the whole business, not only of determining what should be done in reconstructing the machines, and how it should be done, but also of determining what was their condition as to safety when they were finished, and of supervising them in reference to their condition afterwards. Taking charge and having supervision of the reconstruction, and of the machines afterward, was a part of the master's duty under his implied contract with the plaintiff. Inasmuch as the defendant assumed to do it through Marcil, it is liable for the consequences of his negligence. To hold otherwise would be to permit a master, who is incompetent to perform a duty which the law puts upon him in relation to the condition of his machinery, to relieve himself from all responsibility for the performance of it by employing another to represent him. In the opinion of a majority of the court there was no error in the instructions.

Exceptions overruled.

FEMALE EMPLOYEE INJURED WHILE OPERATING A "SLUBBER" MACHINE—DEFECTIVE APPLIANCE—MASTER LIABLE.—In **RICE v. KING PHILIP MILLS**, 144 Mass. 229 (*March, 1887*), female employee injured while operating machinery in defendant's cotton mills, defendant's exceptions to verdict returned for plaintiff were *overruled*. It appeared from the bill of exceptions that the plaintiff, who was about fifty years of age, had worked the greater part of her life in cotton mills, and had worked for defendant for upwards of seven years before the accident occurred for which this action is brought, in the carding-room, and all the time on the same machine on which she was hurt "This machine is called a slubber, and takes the ribbons of cotton as they come from the cards and railway heads and an intermediate machine, and twists them into a coarse yarn, which is wound on bobbins set on the front of the machine. In order to wind this yarn on the bobbins in successive layers, and so as to make the full bobbins taper from the middle towards each end, the machine is so constructed as to give the bobbins an upward and downward motion while the twisting and winding process is going on. A part of the machinery for securing this motion consists of a small grooved pulley two or three inches in diameter, over which a chain passes, which is attached at one end to an upright shaft, on which is a small gear which runs into a horizontal rack, and to the other end is hung a weight. This arrangement was intended to regulate the successive layers of yarn on the bobbin, and with each change in the upward or downward motion of the bobbin the rack moves about half an inch, and the weight drops about the same distance. This occurs several times a minute, and continues until the bobbin is full, when the machine stops. This work is all done automatically. The machine is about twenty feet in length, and about four feet wide and four and a half feet high, with iron posts or stanchions on the sides and solid iron at the ends. As the machine is constructed, the weight hangs in sight on the back side of the machine, about eight or ten inches inside these posts or stanchions, and about a third of the length of the machine from the outer end, or end next the wall of the mill; at its highest point it is about a foot and a half, and at its lowest about six to eight inches, above the floor. There are generally standing on the floor behind the machine three rows of tin cans about two and a half feet high, which hold the ribbons of cotton, and from which the ribbons are taken by the slubber. While these stand there, they obstruct the view of the weight. They are empty more or less of the time, or are moved away to get at the machine to clean it. At the time of the accident, the plaintiff testified that the weight was at about its highest point. There is ample room around the machine. The duty of the plaintiff was to see that the machine was kept running, to take off the full bobbins and put on others, to notify the over-

seer or his subordinate if she knew there was anything wrong about the machine, and to see that it was kept clean. It appeared that on the day before the accident, the plaintiff had called on the third hand to repair a belt which he had done. The plaintiff testified that, on the day of the accident, she had cleaned a considerable portion of the machine during the noon hour; that after the noon hour she took off the bobbins, which were all full, started up the machine, and went around to the back side to finish cleaning; that she was down on the floor on her knees near where the weight hung, leaning on her right hand, which was on the floor, palm downwards, and brushing off inside the machine, which was in motion, with a brush in the left hand; and that an extra weight, which had been hung by a raw-hide lacing to a hook fastened into the chain to which the other weight hung, fell upon her right hand, in consequence of the breaking of the lacing, and caused the injuries complained of."

In delivering the opinion of the Supreme Court, FIELD, J., said: "The evidence of the manner in which the weight was attached to the machine, of the purpose for which it was attached, and of the effect produced by it in the working of the machine, being undisputed, the court rightly ruled that it was a part of the machine, within the meaning of the law that the defendant was bound to exercise due care in furnishing suitable machines, and in keeping them in proper repair. There was evidence for the jury that the plaintiff was in the exercise of due care. There was evidence that she did not know, and that it was not her duty to know, that the weight was attached to the chain in an unsafe manner, or that the lacing was, or had become, too weak to support the weight. She knew that the weight was attached to the chain by a raw-hide lacing, but it was not necessarily a part of her duty to decide whether this was a suitable or safe means of hanging the weight, and she may have known nothing of the strength of raw-hide lacings."

The court then discussed the duty of the master to furnish proper appliances for use of servant, and held that it was for the jury to determine whether that duty had been performed.

**NOTES AND ABSTRACTS OF MASSACHUSETTS CASES RELATING
TO EMPLOYEES INJURED BY MACHINERY, DEFECTIVE AP-
PLIANCES, SET SCREWS, ETC.**

Employee injured while operating newly-invented machine — Master liable.

In *WALSH v. PEET VALVE COMPANY AND ANOTHER*, 110 Mass. 23, where plaintiff, a house-joiner in defendant's employ, was injured by his hand being crushed by machinery, defendants' exceptions to verdict for plaintiff for \$3,000 were *overruled*. The opinion by the court is as follows:

"The case finds that at the time of the injury plaintiff was at work, in the presence of his employers, upon a newly invented machine which he had never seen before. His claim is, that, in whatever he did, he acted under

their directions given upon the spot, which he supposed would not have been given if they had considered it unsafe for him to follow them. If he did not know, or had any reason to suppose, that the upper flask was so imperfectly balanced or badly secured as to make it dangerous for him to place his hand upon the lower flask, in order to move it along, as they directed him to do; and if they knew or ought to have known it, and gave him no warning of the danger, he would be entitled to recover. *Cayzer v. Taylor*, 10 Gray, 274, 15 Am. Neg. Cas. 500, *ante*; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*. Upon this point there was a conflict of evidence, and of course the case could not properly have been withdrawn from the jury. Exceptions overruled."

Minor employee injured while operating machine — Failure to instruct — Case for jury.

In *O'CONNOR v. ADAMS AND ANOTHER*, 120 Mass. 427 (June, 1876), where an employee of defendants, who had had no experience whatever with machinery, was set to work on a machine in a sugar refinery, without instruction as to operating same, and while cleaning the same his hand and arm were caught and severely injured, he being at the time not quite twenty-one years of age, it was held that the case was for the jury. *ENDICOTT, J.*, in delivering the opinion said:

"Upon a careful examination of the report, the court is of opinion that there was evidence tending to show that the defendants' agents put the plaintiff in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks, or instructing him how to avoid them. That question was proper to be submitted to the jury, together with the question whether the plaintiff was in the exercise of due care at the time.

"The duty of an employer to take proper precautions for the safety of a person employed in running or tending machinery, especially when such person, through youth, inexperience or want of capacity, may be unable to appreciate or avoid the danger to which he is exposed is fully considered in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*. It was there held that if the jury were satisfied that the defendant knew the peril to which the plaintiff would be exposed, and did not give him sufficient or reasonable notice of it, and he, without negligence on his part, through inexperience or reliance on the directions given, failed to perceive or understand the risk and was injured, the defendant would be responsible. The principal cases, both in this commonwealth and in England, are commented upon in the opinion of Mr. Justice Hoar, and it is unnecessary to review them again. See, also, *Sullivan v. India M'fg Co.*, 113 Mass. 396, 15 Am. Neg. Cas. 527, *ante*; *Railroad Co. v. Fort*, 17 Wall. 553. Case to stand for trial."

Employee injured by machinery — Warning — Instructing employee — Question for jury.

In *BJBIAN v. WOONSOCKET RUBBER CO.*, 164 Mass. 214 (September, 1895), judgment was rendered on the verdict for plaintiff. The case is stated in the syllabus to the official report as follows:

"The plaintiff, an adult foreigner, understanding English imperfectly and unfamiliar with machinery, was put at work on a compounding machine

in the defendant's rubber factory in charge of a fellow-workman, who instructed him as to his duty. The machine consisted of two heated steel cylinders, closely set, and revolving in opposite directions, between which pieces of rubber and chemicals to be combined were slowly ground. It was the duty of the plaintiff to feed the machine with material, which he guided either with his hands or with a hoe. During the noon hour of the second day on which the plaintiff was so employed, and in his absence, a fellow-workman, who had further separated the cylinders for the purpose of oiling them, failed to readjust them. The increased distance between them was not obvious, and the plaintiff, unaware that their position had been or could be altered, on returning to his work, placed a piece of rubber between them, and guided it with his hands as he had been taught. The rubber fell through the cylinders suddenly, and the plaintiff, perplexed, turned for advice to his instructor, who merely laughed, and the plaintiff, interpreting the laugh as a direction to do as before, again attempted to guide the rubber with his hands, which were drawn into the machine and injured. Held, that the questions whether the defendant was at fault in not giving the plaintiff instruction or warning, and whether the plaintiff was in the exercise of due care, were for the jury."

It was also held that "an employer is not liable for the negligence of an employee whose daily duty it is to oil machinery, and who, on a single occasion, after oiling it, leaves it in a dangerous condition, whereby another employee is injured." Opinion by BARKER, J.

Injured while operating carding machine — Knowledge of danger — Question for jury.

In *WHITE v. NONANTUM WORSTED CO.*, 144 Mass. 276 (March, 1887), employee injured while at work upon a carding machine in defendant's mill, plaintiff's exceptions to verdict directed for defendant were *sustained*. FIELD, J., said: "There was evidence that the machine was constructed for carding wool, and that, when the fan was run in the manner indicated by the construction of the machine, the machine was safe, but that when the fan 'was diverted from its legitimate office, and made to revolve in the opposite direction' the machine was dangerous; that the plaintiff did not control the running of the machine; that he had never known the fan to be run in the wrong direction but once, and this was two days before the injury; that, the day before, he examined the belting and found the fan running in the right direction; that he could not tell, from the place where he stood when attending to his duties, the direction of the revolution of the fan; and that he had no notice, on the day of the injury, that the fan was running in the wrong direction. If the machine was run in an unusual and dangerous manner, and the plaintiff had nothing to do with this, and the danger was not apparent or known to him, the court cannot say, as matter of law, that the plaintiff was not in the exercise of due care because he had known the machine to have been run in this manner two days before." * * *

Arm drawn into machinery — Warning — Assumption of risk.

In *RICHSTAIN v. WASHINGTON MILLS CO.*, 157 Mass. 538 (January, 1893), verdict for defendant in the Essex Superior Court was *sustained*, and plaintiff's exceptions *overruled*. It appeared that at the time of the accident

plaintiff was about thirty-two years of age; that he came to this country from Russia in 1888, and for about eighteen months before entering into defendant's employ had worked in various employments, some of which required the use of machinery. MORTON, J., said: "It is evident, from the account which he gives of his occupations during the interval between his arrival in this country and the date of the accident, that the plaintiff had become familiar with the use of machinery. He was thirty-two years old when injured, and at the time of the trial, which was about a year after the accident, spoke English so as to testify without an interpreter, and was of at least ordinary intelligence. The machine on which he was working was simple in construction and operation. He does not claim that it was out of repair, or wanting in respect to any appliance. He was set to work on the morning of the accident with one Crowley, who was running it, and helped him start it up. After it was started, Crowley went away, saying nothing to the plaintiff, who supposed he would return, though he did not know. The plaintiff knew that the cloth was to be wound and re-wound back and forth through the liquor in the bottom of the vat on to the rollers at the ends of the machine. When the cloth was almost all wound on to the roller on which it was winding when Crowley went away, the plaintiff, without any direction from any one, reversed the motion of the rollers, and attempted to make the loose end of the cloth catch upon the roller at the opposite end by throwing it over the roller and tucking the end up under between the roller and the cloth, as he had seen Crowley do. While doing this his fingers were caught, and his arm drawn in between the roller and cloth, causing the injury complained of. If we assume that it was a part of the plaintiff's duty to keep the machine going, we still think that the risk accompanying what he did was of such a character that, taking his age, intelligence, and experience into account, he might be fairly supposed to understand and appreciate it, and that therefore neither the defendant nor any of its superintendents were negligent in not warning or instructing him concerning it." * * * (Citing several cases.)

Employee injured by gearing of machinery—Assumption of risk.

In *GOODRIDGE v. WASHINGTON MILLS Co.*, 160 Mass. 234 (November, 1893), verdict directed for defendant was sustained and plaintiff's exceptions *overruled*. Plaintiff was a loom fixer in defendant's mill, was twenty-seven years of age, had worked for seven years in other mills as a loom fixer and machinist, and had worked in the room in defendant's mill where the accident occurred for about four months. The place where the machine stood was well lighted, and the danger from contact with the gears was obvious. There was nothing to show that there had been any change in their condition. They were in plain sight, and near the place where the plaintiff's duties required him to be. He knew that on some of the looms in the room the gears were uncovered. Held, that he assumed the risks.

Employee injured by being caught in gearing of machine.

In *WOSBIGIAN v. WASHBURN & MOEN M'FG Co.*, 167 Mass. 20 (October, 1896), where plaintiff, while working in defendant's wire mill, was injured by his fingers being caught in the gearing of a machine, the employee

who had just been oiling the gearing having negligently left it out of place, plaintiff's exceptions on verdict directed for defendant were overruled, the master not being chargeable with negligence of the employee, who was a competent person for his work, leaving the gearing unguarded.

Female employee injured by laundry machine — Assumption of risk.

In *CONNOLLY v. ELDREDGE ET AL.*, 160 Mass. 566 (March, 1894), the syllabus to the official report sufficiently states the case as follows: "A woman was injured by having her hand caught between the rollers of a steam ironing machine in a laundry, where she had worked for several weeks. She was familiar by observation with the operation of the machine. The upper roller was covered with white cloth and was directly above the lower roller, which was larger, of iron, and hot, and the rollers were in contact with each other; there was a horizontal shelf in front of the point of contact of the rollers, and across the shelf was a rod used as a guard, under which, in operating the machine, the articles to be ironed were slid. When injured, the woman was putting a new cloth covering on the upper roller, over the guard, by direction of her superior, but without special directions. Held, in an action against her employer for her injury, that the elements of danger were obvious, and required no instructions to make them appreciated, and that the action could not be maintained." Verdict directed for defendants sustained.

Employee injured by heel-presser machine.

In *TREMBLAY v. HARNDEN*, 162 Mass. 383 (November, 1894), tort, for personal injuries sustained by plaintiff while in defendant's employ, plaintiff's exceptions on verdict returned for defendant were *overruled*. Opinion by KNOWLTON, J. It appeared that plaintiff, when injured, was working upon a machine called a heel-presser, which was operated by pulleys regulated by a break, and to which power was communicated by applying the foot to a treadle. It consisted also of a fixed headpiece and a movable plate on which heels were placed, and by coming in contact with the headpiece the necessary pressure on the heels was obtained. It further appeared that the injuries were caused by the plaintiff having his hands caught between the headpiece and the plate, while removing some heels which stuck to the plate.

Employee injured while operating a shoe machine — Guard — Knowledge of danger.

In *QUIGLEY v. THOMAS G. PLANT COMPANY*, 165 Mass. 368 (February, 1896), where plaintiff's hand was injured while operating a Bresnahan dieing-out machine, defendant's exceptions to verdict for plaintiff were *sustained*, on the ground that the danger was as well known to plaintiff as to defendant. It appeared that a piece of tin called a guard, which was not part of the machine as originally constructed, was affixed to the machine, the object being to form a shield or protection against pieces of leather falling on the gearing of the machine. Plaintiff had worked upon the machine, with the guard attachment, for nearly three years up to the time of the accident. The contention was that such guard increased the risk of operating the machine. There was no defect in the machine.

Employee injured by circular saw — Guard — Question for jury — Master liable.

In *WHEELER v. WASON MANUFACTURING CO.*, 135 Mass. 294 (September, 1883), tort, for personal injuries sustained by plaintiff while operating a circular saw in defendant's employ, defendant's exceptions to verdict rendered for plaintiff were *overruled*. The first paragraph to the official report states the case as follows: "In an action for personal injuries occasioned to the plaintiff while in the defendant's employ and operating a circular saw used in sawing boards, there was evidence tending to show that boards, while being sawed, sometimes spring back; and that it is customary to put the hand behind the saw to steady a board which becomes unsteady in sawing; that in sawing boards into strips, and in some other kinds of work, it is practicable to have a guard, of about the thickness of the saw, so placed behind the saw as to furnish protection in case of the board jumping back when the hand is behind the saw. It was admitted by the defendant that there was a guard which belonged to the saw used by the plaintiff, as a part of its equipment, and which was kept about it, and was used with the saw or not, as suited the convenience of the workmen; and there was evidence that this guard was not high enough to afford any protection. The plaintiff testified that there was no guard on the saw on the day of the accident, and that he did not know there was any belonging to it. There was also evidence tending to show that the plaintiff was inexperienced in the use of the circular saw; and that, until that day, he had never undertaken to run one. Held, that there was evidence to be submitted to the jury that the saw was in an unsafe and improper condition for the plaintiff to be put to work upon. Held, also, that it was a question for the jury whether a guard was reasonably necessary. Held, also, that there was evidence which would warrant the jury in finding that there was danger in using the saw, known by the defendant and not known by the plaintiff, and which he might not have known, though in the exercise of ordinary care."

Employee injured by circular saw — Guard — Master not liable.

In *CLUNY v. CORNELL MILLS*, 160 Mass. 218 (November, 1893), carpenter in defendant's employ injured while operating a circular saw, verdict for defendant was sustained, plaintiff's exceptions being *overruled*. The opinion of the Supreme Court (per ALLEN, J.) was as follows: "It appeared from the plaintiff's own testimony that the guard was intended, as he well knew, to come down close to the board which was to be sawed, and that if it had been so placed the accident could not have occurred as it did; that the plaintiff ran the saw with the guard resting upon the gauge, about three and one-half inches higher than it was intended to be; and that the accident occurred in consequence of the guards being in this position. Under these circumstances the presiding justice rightly ruled that the plaintiff could not recover. There was no negligence on the part of the defendant which contributed to the accident; and it is immaterial whether the guard might have been useless or even dangerous in other ways, if placed where it was intended to be placed. *Daigle v. Lawrence M'fg Co.*, 159 Mass. 378. Exceptions *overruled*."

Dangerous place in saw-mill — Employee falling and injured by circular saw.

In *DOLPHIN v. PLUMLEY ET AL.*, 167 Mass. 167 (November, 1896), tort,

for personal injuries received by plaintiff while working in defendant's saw-mill, verdict directed for defendants was not sustained, the Supreme Court holding that the case was for the jury. LATHROP, J., stated the facts as follows: "The plaintiff was a man fifty years old, who had had experience in similar mills, and had been in this mill about two months, and was well acquainted with it. He sustained the injury complained of by attempting to pass from one end of the mill to the other, through a space about two feet wide, between a circular saw four feet in diameter, and the handle bar which controlled the speed of the saw. To go by the saw it was necessary for him to pass over a movable platform or apron, the purpose of which was to prevent splinters and chips thrown off by the saw from falling below and clogging the machinery. While crossing the apron it sank down a little, he fell, and his hand struck the saw, and he lost some of his fingers. It appeared that the first-named defendant, about twenty minutes before, had taken up the apron for the purpose of getting at the machinery below, and the jury might have found that he did not restore it to its place, and that this was negligence on the part of the defendants, if they allowed this apron to be used as a way for passing from one end of the mill to the other." * * * Plaintiff's exceptions sustained.

Employee injured by saw-machine carriage — Master liable.

In *MOONEY v. CONNECTICUT RIVER LUMBER CO.*, 154 Mass. 407 (September, 1891), employee in defendant's saw-mill injured by a saw-machine "carriage," verdict for plaintiff was sustained and defendants exceptions overruled. KNOWLTON, J., said: "There was evidence that the carriage of the sawing machine started up, and injured the plaintiff, when it was left at rest with the steam shut off, and the lever locked which was used to start and stop it. It was proved, and not disputed, that a machine which would do that was improperly constructed, or improperly adjusted, and was unsafe. There was evidence that the defendant's foreman knew, several days before the accident, that the machine had 'run away,' or started up when no one was near it. The jury were warranted in finding that the defendant was negligent in not seeing that it was properly constructed and adjusted, so as to be safe, when it was originally put in position, or in not considering its dangerous condition and making it safe before the accident." * * *

Employee injured while cleaning carding machine — Fellow-servant — Assumption of risk.

In *SMITH v. LOWELL MANUFACTURING CO.*, 124 Mass. 114 (February, 1878), judgment was rendered on the verdict returned for defendant, the opinion by MORTON, J., being as follows: "The plaintiff was engaged in cleaning the outside frame of a carding machine. In rubbing the movable board, which formed a part of the frame, he pressed it in at the top, and was injured. This board was kept in place by wooden buttons on the outside, held with screws. The only evidence in the case which tended to show the cause of the board's giving way, was that the button at the bottom, intended to keep it in its place, had become loosened. In entering the defendant's service, the plaintiff assumed all the ordinary risks of his employment, including those arising from the negligence of his fellow-servants. The only negligence which the jury would be justified in finding.

upon the evidence, to be the cause of the plaintiff's injury, was negligence of a fellow-servant in not tightening the screw which held the loosened button. For such negligence, the defendant is not responsible to the plaintiff, it being admitted that it employed competent and suitable servants. The ruling of the presiding justice that, upon the evidence, the plaintiff could not maintain his action, was therefore correct. Judgment on the verdict."

Employee injured while removing waste from cylinder — Knowledge of danger.

In *DAIGLE v. LAWRENCE MANUFACTURING CO.*, 159 Mass. 378 (June, 1893), tort, for personal injuries sustained by plaintiff while in defendant's employ, plaintiff having lost his arm while removing waste as it accumulated inside of a cylinder, plaintiff's exceptions on verdict directed for defendant were *overruled*, it being held (as per syllabus to the official report): "If an employee receives injuries while removing waste as it accumulates inside of a cylinder, he cannot recover therefor of his employer, if there was no negligence on the part of the employer, and if the employee understood and appreciated the risk of the danger."

Employee injured while oiling machine — Burden of proof.

In *SHAUGHNESSY v. SEWALL AND DAY CORDAGE CO.*, 160 Mass. 331 (January, 1894), the syllabus to the official report sufficiently states the case as follows: "In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, the declaration alleged, in substance, that while the plaintiff was in the process of oiling a machine it suddenly and unexpectedly started into motion; that when shut off for the purpose of oiling it was likely to start; that the defendant knew or ought to have known that it was likely to start; and that the defendant omitted to caution the plaintiff that it was likely to start. At the trial, the case was tried upon the theory, on the plaintiff's part, that the machine started of itself; and, on the defendant's part, that it was started by a fellow-servant of the plaintiff. Held, that the judge rightly ruled that the plaintiff had the burden of proving that the machine started of itself; that he could not recover unless he proved this; and that, if the jury were unable to decide what caused the machine to start, he was not entitled to recover." Plaintiff's exceptions to verdict returned for defendant *overruled*.

Employee injured while cleaning engine — Contributory negligence.

HENRY v. KING PHILIP MILLS, 155 Mass. 361 (January, 1892), was an action of tort for personal injuries sustained by plaintiff, while in defendant's employ and engaged in cleaning its engine, by having a finger caught therein by reason of the alleged negligence of the engineer, "a person in the service of the defendant intrusted with and exercising superintendence," and of the negligence of the defendant in failing to instruct or warn him of the danger of cleaning certain parts of the engine. Verdict directed for defendant was *sustained*, it being held that "the evidence fails to show due care on the part of the plaintiff, or a want of care on the part of the defendant, or of any person exercising superintendence for the defendant, or any lack of suitable instructions to the plaintiff."

Employee injured while operating steam hammer — Nominal damages.

In *MULCAHEY, ADM'X v. WASHBURN CAR WHEEL CO.*, 145 Mass. 281

(November, 1887), tort, for personal injuries sustained by plaintiff's intestate, by the breaking of a piston rod of a steam hammer which he was engaged in operating while in the employ of defendant, verdict for plaintiff for nominal damages, one dollar, was sustained, and judgment was rendered on the verdict, plaintiff's exceptions on the ruling as to damages being *overruled*. Opinion by DEVENS, J.

Person injured while placing machine in mill — Not a servant of mill owner.

In *WARD v. NEW ENGLAND FIBRE CO.*, 154 Mass. 419 (September, 1891), plaintiff's exceptions on verdict for defendant were *overruled*, the case being stated in the syllabus to the official report as follows: "On the issue whether the plaintiff was the defendant corporation's servant, and a fellow-servant of its employees, by whose negligence he was injured, there was evidence that he was working by the month for a firm engaged in putting a machine into the defendant's mill; that the defendant's agent had prepared the specifications for the machine and 'sent the order' to the firm 'to do the job,' but gave no further directions to the firm in regard to the work; and that, when nearly completed in the firm's shop, the machine was carried to the mill to be set up, the supporting woodwork being prepared by the defendant's employees on the same day. A member of the firm testified: 'There was no contract as to making' the machine; 'we were to charge them for stock and time.' Held, that there was evidence upon which the jury might properly find that the plaintiff was not a servant of the defendant." Opinion by KNOWLTON, J.

Defective spinning machine.

In *SULLIVAN v. WAMSUTTA MILLS*, 155 Mass. 200 (January, 1892), tort, for personal injuries to plaintiff while employed in defendant's mills, the declaration was at common law, and alleged, among other things, that the accident was due to defendant's employing incompetent servants, and to its suffering a mule spinning-machine to be defective and dangerous by reason of the want of a catch or hook to secure the shipper by which the belt operating the machine was guided. It was held that the absence of the said catch did not in any way contribute to cause the accident, and verdict was properly directed for defendant. Plaintiff's exceptions *overruled*.

Female employee injured by defective appliance on cartridge machine — Question for jury.

In *TOY v. UNITED STATES CARTRIDGE CO.*, 159 Mass. 313 (June, 1893), female employee injured by the breaking of a punch in a cartridge machine which she was operating, plaintiff's exceptions on verdict directed for defendant were *sustained*, on the ground that there was evidence of plaintiff's due care, and that there was evidence of a defect in the punch sufficient to go to the jury.

Defective appliance — Breaking of bolt in machine.

In *CHALMERS v. WHITMORE MANUFACTURING CO.*, 164 Mass. 532 (November, 1895), tort, for personal injuries sustained by plaintiff while in defendant's employ, by the breaking of a bolt in a machine upon which he was at work in the defendant's mill at Holyoke, verdict directed for defendant was sustained, plaintiff's exceptions to exclusion of certain evidence being *overruled*. Opinion by KNOWLTON, J.

Defective machinery and appliances — Fellow-servant.

In *WOOD v. NEW BEDFORD COAL CO.*, 121 Mass. 252 (November, 1876), where plaintiff was injured while in defendant's employ, by machinery and appliances used in receiving and delivering coal, defective appliances and incompetency of engineer in running the steam engine being alleged, judgment was rendered on the verdict directed for defendant, the evidence clearly showing that the injury was caused by the negligent act of a fellow-servant.

Defective brake on car — Collision with cars.

In *SPAULDING v. W. N. FLYNT GRANITE CO.*, 159 Mass. 587 (October, 1893), the defendant was held liable in an action where plaintiff, a workman employed by defendant, "was directed to run a car loaded with stone down from defendant's quarry to where the car would be taken away by an engine on the Boston and Albany Railroad. The track over which he was to pass descended gradually, so that the car moved by gravitation. After starting, the plaintiff found that he could not control the car with the brake, it ran away with him, ran into some other cars, and plaintiff's foot was crushed by the stone. The plaintiff's evidence tended to show that the brake was defective. The defense mainly relied on is that the car was furnished by the Boston and Albany Railroad, that the defendant had to take what it could get, and, therefore, that it ought not to be held to the rule as to furnishing proper instrumentalities, but only to the duty of inspection, as in the case of cars received from connecting lines to be forwarded. *Mackin v. Boston & A. R. R.*, 135 Mass. 201, 15 Am. Neg. Cas. 489, *ante*; *Keith v. New Haven & N. Co.*, 140 Mass. 175, 180, 15 Am. Neg. Cas. 487, *ante*. The judge before whom the case was tried ruled otherwise, and the defendant excepted." The Supreme Court said: "With regard to the main question above mentioned, we are of opinion that the exception or distinction established by *Mackin v. Boston & A. R. R.*, 135 Mass. 201, 15 Am. Neg. Cas. 489, *ante*, does not apply, and that the ruling was correct. Whatever may be said of a car received by a railroad only for the purpose of being forwarded and not used by it at all in the process (*Coffee v. N. Y., N. H. & H. R. R.*, 155 Mass. 21, 23, 15 Am. Neg. Cas. 447, *ante*), this car was used by the defendant as one of the instruments of its business. When that is the case, it does not matter whether the defendant owns the thing used or borrows it. The responsibility of the master to his servants is the same either way." Defendant's exceptions overruled.

Employee injured by pile-driver — Foreman — Knowledge of incompetency — Assumption of risk.

In *HATT v. NAY*, 144 Mass. 186 (March, 1887), employee injured while at work with a pile-driver, negligence of defendant's foreman being alleged, plaintiff's exceptions to verdict for defendant were *overruled*, on the ground that, having knowledge of incompetency of foreman and continuing to work under him, plaintiff assumed the risk.

Employee fixing appliances over machinery falling to ground — Assumption of risk.

In *WILSON v. TREMONT AND SUFFOLK MILLS*, 159 Mass. 154 (May, 1893), tort, at common law, for personal injuries sustained by plaintiff while in

defendant's employ, "while standing upon a moulding about two inches wide around the top of a machine for drying cotton, known as a 'dryer,' and endeavoring to attach a rope to a spike driven into a beam overhead which he could just touch with his hands, losing his balance and falling to the ground," plaintiff's exceptions to verdict returned for defendant were *overruled*, it being held that the danger was obvious, and that plaintiff assumed the risk.

Fall of appliance to machine.

In *MCCARTHY v. BOSTON DUCK CO.*, 165 Mass. 165 (January, 1896), plaintiff's exceptions on verdict returned for defendant were *overruled*. Opinion by FIELD, C. J. At the trial in the Superior Court, Hampden, before DEWEY, J., it appeared that the plaintiff, when injured, was at work in the dye-room of the defendant's mill mixing some dye stuffs in a tub; that the tub stood near a certain machine, and the plaintiff, while at work, stood in a stooping posture directly underneath the belt which ran from the fixed pulley on the machine to the pulley on the shaft overhead; that the belt was fastened by a Talcott plate, which was a piece of iron about three and one-quarter inches wide with two double rows of teeth projecting from the under side, and these teeth were driven through the belt, one row through each end, and then clinched on the under side; and that the belt broke at the point where it was fastened together and, falling, struck the plaintiff, causing the injuries complained of.

Dangerous working place — Machinery — Duty to instruct employee.

In *ATKINS v. MERRICK THREAD CO.*, 142 Mass. 431 (October, 1886), tort, for personal injuries received by plaintiff while in defendant's employ, through the alleged neglect of defendant to provide safe and suitable machinery and tools, and to give suitable and proper instructions as to the manner of doing the work required to be done by plaintiff at defendant's mill, verdict returned for plaintiff was sustained, the Supreme Court saying: "It is the duty of a master, who sets a servant to work in a place of danger, to give him such notice and instruction as are reasonably required by the youth, or inexperience, or want of capacity of the servant. This duty is not confined to cases where the servant is 'a man of manifest imbecility,' and the sixth instruction requested by the defendant was rightly refused. *Exceptions overruled.*"

Contact with coupling of shaft — Slippery floor — Fellow-servant.

In *MURPHY v. AMERICAN RUBBER CO.*, 159 Mass. 266 (June, 1893), the syllabus to the official report states the case as follows: "An employee slipped on the floor of the room in which he was working, caught his foot between a coupling on the shaft and the floor, and was injured. In an action against the employer, it appeared that under the circumstances there was no duty on the part of the employer to instruct the employee that the coupling on the shaft was not boxed, and the room was properly lighted. There was no allegation in the declaration that the defendant was negligent in allowing the floor to be 'slushy,' but it appeared that, if such was its condition, it was caused by oil from the machinery, of the oiling of which the plaintiff had charge. Held, that, if it was the normal condition of the floor to be wet and slippery, this was a risk which the plaintiff assumed;

that if such was not its normal condition, but the slipperiness was caused by the neglect of the man employed to look after the pipes, this was the fault of a fellow-servant, and that the plaintiff could not recover." Opinion by LATHROP, J.

Slippery floor — Caught in pulley of washing machine — Assumption of risk.

In *KLEINEST v. KUNHARDT ET AL.*, 160 Mass. 230 (November, 1893), judgment was rendered on the verdict directed for defendants in the Superior Court. The Supreme Court (per KNOWLTON, J.) stated the case as follows: "The plaintiff fell, and in falling caught one of his hands in a pulley on a washing machine in the defendants' mill, and was injured. The floor was wet and slippery with soap and water from the washing machines, and the defendants are alleged to have been negligent in allowing the floor to be in that condition, and the pulley to be exposed near a place where workmen were expected frequently to pass. The plaintiff testified that the floor was always wet, and it appears that the condition of the floor and the pulley at the time when he entered the defendants' service were the same as at the time of the accident. This condition was open and obvious, and it must be held that the plaintiff impliedly contracted, not only to work in this place, but also to assume the risk of accidents arising from the wet floor and the exposed pulley. *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 15 Am. Neg. Cas. 583, *ante*; *Fink v. Fitchburg R. R.*, 158 Mass. 238, 15 Am. Neg. Cas. 460, *ante*. The defendants were under no obligation to the plaintiff to change the condition of their works in these particulars. Judgment on the verdict."

Fall of shafting and pulleys — Dangerous place to work.

In *OUILLETTE v. OVERMAN WHEEL CO.*, 162 Mass. 305 (October, 1894), tort, for personal injuries sustained by plaintiff while working in defendant's factory, caused by the falling upon him of shafting and pulleys fastened to beams overhead by two hangers, defendant's exceptions to verdict for plaintiff were *sustained* on ground of erroneous exclusion of a certain question to a witness. Opinion by MORTON, J. At the trial there was evidence tending to show that the plaintiff's duty called him to occupy a certain place in a room assigned to him by his foreman, but not to use any of the machinery, and that he did not use any of it; that over the place where the plaintiff was working a steel shaft two and fifteen-sixteenths inches in diameter was placed, supported by cast-iron hangers fixed to the timbers overhead, the shaft being about eleven feet above the floor where the plaintiff was; that upon this shaft were two iron pulleys, one fifty and the other thirty inches in diameter; and that one of these pulleys was driven by a belt leading from a pulley on the main shaft, and the other supplied power by means of a belt to run a fan. The plaintiff did not testify as to the causes which led to his injury, except so far as to state the place where he was at work, and his assignment there by the foreman. The plaintiff contended, and introduced evidence tending to show, that the shaft and the machinery connected therewith, and its method of attachment to the timbers of the floor above, were improper, insufficient, and insecure, and that the defendant ought to have known that they were not sufficient and safe.

CLOTHING CATCHING ON REVOLVING SHAFT — SET SCREW — CONTRIBUTORY NEGLIGENCE.— In **RUSSELL v. TILLOTSON ET AL.**, 140 Mass. 201 (*October, 1885*), plaintiff's exceptions to verdict directed for plaintiff were overruled, the case being stated in the opinion by HOLMES, J., as follows: "The plaintiff seeks to recover for damages to his person, caused, while employed in the defendant's mill, by his apron and jacket catching on a revolving shaft while he was standing on a ladder and replacing a board upon a belt-box into which the shaft ran at right angles. The shaft was plainly visible, and was seen by the plaintiff. If the ladder had been placed on the opposite side of the box, there would have been no danger. The plaintiff could have moved the ladder. But, according to his testimony, it was standing where he mounted it at the time when he was ordered by the 'boss' to go up and nail the board on, and the plaintiff, although he had worked in mills for a long time, and was acting within the scope of the duties which he had undertaken, did not know any better way to do the work than that which he took. The court below directed a verdict for the defendant. The plaintiff excepts; and contends that he was sent into a concealed danger without due warning or instruction. The exception must be overruled. The plaintiff does not pretend that he was ignorant of the danger of a revolving shaft, nor that the order to him carried any prohibition to put the ladder in such position as he might deem best, nor that there was anything in the form of it to hurry him or disturb his judgment; but simply that he had not sufficient intelligence—for that is what it comes to—to see that he was less likely to come in contact with the shafts if he had the barrier of the belt-box between him and the shaft; or, if he took a worse place, to keep away from the danger which he knew. As it is not suggested that he was a man of manifest imbecility, we think that the foreman was entitled to assume that the plaintiff would protect himself by whatever precautions were necessary. *Williams v. Churchill*, 137 Mass. 243. See *Leary v. B. & A. R. R.*, 139 Mass. 580. Exceptions overruled. (G. M. STEARNS, appeared for plaintiff; E. M. WOOD, for defendant.)

EMPLOYEE CAUGHT AND INJURED BY SET SCREW PROJECTING FROM SHAFT—KNOWLEDGE OF DANGER — NEGLIGENCE NOT SHOWN.— In **GOODNOW v. WALPOLE EMERY MILLS**, 146 Mass. 261 (*March, 1888*), it appeared that plaintiff was employed in July, 1881, to take charge of and run the engine and pumps in the defendant's mill by one Way, its superintendent. The plaintiff was injured on October 20, 1881, by being caught upon a set screw projecting about one inch from the collar of a two and a half inch smooth shaft, the collar being three inches

broad and fixed on a shaft contiguous to the box or journal holding the end of the shaft, and the set screw being in the middle of the collar. The set screw had a square head with four sharp corners, and was within about two inches of the box or journal which was hung vertically, the box being sixteen inches long, six inches wide, and six inches deep. The collar and set screw were about three feet from the stamp which the plaintiff was repairing when injured. On the trial of the case in the Superior Court (Suffolk) before ALDRICH, J., the jury were directed to return verdict for defendant. H. W. BRAGG appeared for plaintiff; H. G. NICHOLS (R. M. MORSE, JR., with him), for defendant. The opinion by the Supreme Court (per DEVENS, J.), rendering judgment on the verdict for defendant, is as follows:

"It was for the plaintiff to show both that he himself was in the exercise of due care, and that the injury to him was occasioned by the negligence of the defendant. He was an intelligent man, of about thirty-seven years of age, who had been in the employ of the defendant for about three months as a machinist and engineer, employed to run the engine and pumps, and have charge of them. He had previously been employed in this business elsewhere, for three seasons and part of a fourth, taking the whole care of the engine, and keeping it in ordinary repair. On the day of the accident he had been asked by the superintendent of the defendant's works to repair a stamp under his direction. The superintendent told him 'what he wanted done, and how he wanted it done,' which was by taking out the lining of the mortar and putting in a new one. The plaintiff assented, and when ready to go to work the superintendent 'went in and showed' him 'what he wanted done, and what had got to be done.' The plaintiff took charge of this job voluntarily. It was not in the regular line of his employment, but was extra work, for which he was to receive extra compensation. The engine was in motion, a shaft passing through the 'stamp-room,' as it was called, and revolving at the rate of one hundred and seventy times a minute. A set screw projected about an inch from the collar of the smooth shaft, which collar was about three inches broad, and fixed on the shaft contiguous to the box or journal holding the end of the shaft. The set screw was in the middle of the collar, and kept it in its place. The plaintiff was at work about three feet from this set screw, upon the platform on which the mortar was placed. He describes the accident as follows: 'I was at work in the stamp-room in front of the mortar here. Scott, from above, lowered the lining down, and it was partly in the mortar, and Morrissey and I were pushing it in. I stepped down, put my shoulder underneath the corner to push the lining in, and I was caught. (The witness illustrated with a model the manner in which he did this.) At that time I did not know anything about any set screw being on the shaft;

never had any intimation of any such thing. There was nothing in my duties which would require me to see it or know it was there, or to call my attention to it; the next thing that I knew I was going around with the shaft.' From his own testimony, it further appeared that the plaintiff knew perfectly the object of set screws, which are very common in machinery, and of which there were four or five on his engine. He knew also the danger of revolving machinery and intended to keep at a safe distance from it. He stated that he knew that the shaft was revolving, and 'presumed' that he could have stopped the engine, in which event the accident could not have occurred. The plaintiff did not intend to get within sixteen inches of the shaft, nor could he tell how it happened that in stepping back he got so near the shafting as he did, especially as in moving to put the lining into position his movement would be away from the shafting. Nor, as he testified, could he see any reason why he should have got within six inches of it."

"The plaintiff contends, upon these facts, that the defendant did not furnish him a suitable place in which to do his work, nor apprise him of the danger to be apprehended from the revolving set screw, which was not in any way connected with the work which he had in hand. But the plaintiff was before familiar with the place in which the work was to be done; he had examined it the same morning, before commencing his work with the defendant's superintendent. He had also, as appears from his statement, at a former time oiled the shafting at the very journal close to which was the set screw by which he was caught. Even if he had not then observed the set screw, or had not seen it on the morning of the accident on account of the revolution of the machinery, or for any other reason, he knew as an engineer that set screws were in constant use, and that from the purpose for which they were employed it might be expected that the collar would be kept in its position by one. There was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*; *Sullivan v. India M'fg Co.*, 113 Mass. 396, 15 Am. Neg. Cas. 527, *ante*; *Russell v. Tillotson*, 140 Mass. 201, 15 Am. Neg. Cas. 626, *ante*; *Taylor v. Carew M'fg Co.*, 140 Mass. 150.

"It cannot be claimed that the machinery used by the defendant was out of repair, or defective or unsuitable for the purpose. There was evidence on the part of the plaintiff that a recessed collar was in common use, so made that the set screw was sunk into the collar flush with its face, upon which there was much less liability of being caught than on that used by the defendant. But the plaintiff offered no evidence that the collar and set screw as used by the

defendant were not also in common use, while affirmative evidence on this point was offered by the defendant.

"As we are of opinion that the plaintiff has failed to show any sufficient evidence of negligence on the part of the defendant, it is unnecessary to inquire whether he has shown that he himself was in the exercise of due care. Judgment on the verdict."

CLOTHING OF BOY, SIXTEEN YEARS OLD, CAUGHT BY A SET SCREW — GUARD TO SHAFT — NEGLIGENCE NOT SHOWN.— In **HALE v. CHENEY**, 159 Mass. 268 (*June, 1893*), minor employee, sixteen years old, injured by clothing being caught by a set screw, defendant's exceptions were *sustained*. The case is stated in the syllabus to the official report as follows:

"In an action at common law for personal injuries received by the plaintiff while at work for the defendant, there was evidence that at the time of the accident there was in the room where the plaintiff worked a horizontal shaft, twelve feet long and about one foot above the floor, resting on bearings at each end, to which power was communicated by a belt from an upper shaft; that, to prevent longitudinal vibration of the lower shaft, an iron collar was fastened to one end of it by a set screw, the end of which projected half an inch outside the collar; that such a shaft near the floor was a common and proper method of distributing power to the machinery, and that the device to prevent vibration was in ordinary and common use, and preferable to any other, although the collar could have been secured to the shaft without a projecting screw or nut; that at the end of the shaft was an upright post, extending from the bearing in which the end of the shaft rested to the ceiling, the object of which was to hold the bearing in place, and to protect any one from getting on to the pulley, belt, or shaft; that the plaintiff, who was sixteen years old, and of ordinary intelligence, had been in the defendant's employ three months, doing odd jobs about the shop, and at various times, amounting in all to three or four days, working on a machine; that on the day of the accident he was working on a machine the nearest part of which was five feet and four inches from the end of the shaft where the collar was; that on the other side of the shaft, and about the same distance from it, was another machine, at which there was another workman; that while at work the plaintiff had occasion to pass from his machine to hand some work to the other workman; that in so doing he went 'the shortest way, regardless of the machinery, and went right up to the revolving shaft,' instead of going around it as he might have done; that his trousers were caught by the set screw, and he was thrown down and injured; and that when he was caught, as he himself testified, he was not looking down at the shaft, but over it, and straight at the workman who had just taken the work from his hand, and that he did not know that the

screw was there. The evidence was conflicting on the question whether this screw was visible when the shaft was revolving. There was also evidence that the plaintiff 'was not a very careful boy around machinery,' and 'would get too near the machines, and would not apparently know where he was.' *Held*, that there was no evidence that there was a breach of any duty on the part of the defendant which he owed to the plaintiff, *Held*, also, that the defendant was not bound to box the shaft, and that the fact that the collar could be secured to the shaft without a projecting screw or nut was not evidence from which the jury would be warranted in finding that the defendant was not justified in using the device." Opinion by LATHROP, J.

EMPLOYEE INJURED BY SET SCREW TO SHAFTHING — KNOWLEDGE OF DANGER — WARNING — ASSUMPTION OF RISK.— In **ROONEY v. SEWALL AND DAY CORDAGE CO.**, 161 Mass. 153 (*March, 1894*), where plaintiff, an employee of defendant, was injured by a set screw, verdict directed for defendant was sustained and plaintiff's exceptions *overruled*. The bill of exceptions states the facts as follows:

"There was evidence for the plaintiff that, at the time of the accident, his work consisted in hauling piles of soft, loosely coiled hemp along the floor, from two machines called 'breakers' to four other machines called 'drawing-frames' in the same room. These piles of hemp were about three feet wide, about four feet long, and varied between four and five feet in height; they were hauled along the floor by means of a long-handled hook, which the plaintiff fastened at the bottom of the pile near the floor, and which he held in his right hand, while by getting a hold with his left hand in the hemp about two-thirds of the way up from the floor, so as to keep the pile from falling, he walked backwards, dragging it along the floor. Each of these drawing-frames required twelve or fifteen of these piles of hemp at the same time to keep it in operation. These piles were arranged in front of each machine in rows, with three piles in each row, or, taking the rows lengthwise, four or five piles in each row. A different grade or quality of hemp was used by each of these machines. The plaintiff did not know the different grades or qualities himself, but took his information in this regard from the employees in charge of the breakers, from time to time, as required. When each drawing-frame had its full set, it was the plaintiff's work to leave spare piles in places assigned for them, convenient to each drawing-frame, so that, as the piles ran out, the employees attending the drawing-frames might have these spare piles at hand as required. The plaintiff had no charge or care of any of these machines.

"Between the breakers on the one side, and the nearest drawing-frame on the other, there stood a cylindrical machine called a 'topper,' which was all boxed in except the end of the shaft and two pulleys thereon, projecting from the side next to the first drawing-frame. One of these pulleys, next and close to the machine, was fixed tight to the shaft; the other pulley was loose, and was held in place by means of a collar flush with the end of the shaft, and the collar was held in place by means of a set screw. This set screw and shaft stood about three and a half feet from the floor, and were left exposed. The collar and end of the shaft were round and smooth, but the set screw had a sharp cornered square head and stood out perpendicularly from the collar about an inch. This machine received its power by means of a belt running from a large pulley on a revolving shaft overhead near the ceiling to this shaft and by a tight pulley as described at the side of the machine. Alongside of this first drawing-frame, and about seven or eight feet back from the topper, was a space about three feet wide, and room for three or four spare piles of hemp in a row, and in this space the plaintiff, by direction of one Stickmyer, who was superintendent of that room, was accustomed to leave so many spare piles for this drawing-frame. When the topper was not in operation, there was an open way in front of it by which he hauled these spare piles of hemp to this space for the first drawing-frame. When the topper was in operation, this way was closed with hemp for use on the machine, and the only way left to reach it was through a narrow space, three or four feet wide, between the topper and the row of hemp piles set in front of the first drawing-frame.

"About three weeks after the plaintiff began this work, and three days before the accident, the topper was set in operation for the first time during the plaintiff's employment, and, finding the way by which he was accustomed to haul the spare piles for the first drawing-frame closed, he asked Stickmyer, who was present at the starting of the topper, how he should go, and Stickmyer directed him to haul these spare piles through the narrow space between the topper and rows of hemp set before the first drawing-frame. This the plaintiff succeeded for the first two days in doing without any accident, by crowding back with his feet the outside row of hemp set in front of the drawing-frame on one side as he passed, and avoiding the belt and revolving pulleys of the topper on the other. On the morning of the third day, as he was hauling either the first or second spare pile of hemp along this space between the topper and line of hemp in front of the first drawing-frame as directed, and just as the pile he was hauling got opposite the shaft or center of the pulleys, his left hand, about two-thirds of the way up in the pile, was suddenly twisted up in the hemp, throwing him bodily about six feet back, and leaving him sitting on the floor clear of

the hemp, and facing the topper, with his left forearm torn off below the elbow." * * *

In delivering the opinion by the Supreme Court, KNOWLTON, J., said:

"When the plaintiff entered the defendant's service he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, 'I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could be readily ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage.

"A projecting set screw is a common device for holding the collar on a shaft, although there is a safer kind of set screw in common use. Under its contract with the plaintiff the defendant owed him no duty to box the pulley or shaft, or to change the set screw for a safer one. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*.

"It is contended by the plaintiff that the defendant was negligent in not warning him of the danger. The rule of law invoked by the plaintiff applies only when there is a danger known, or which ought to be known, to the employer, of which the employee through youth or inexperience is ignorant, and which the employee cannot reasonably be expected to discover by the exercise of ordinary care. In this case, although the set screw could not be seen when the shaft was revolving, it was plainly visible when the shaft was at rest; and while the screw doubtless increased somewhat the danger of being caught by contact with the shaft, belt, or pulleys, that danger was so obvious to every one, and was manifestly so great, that even the most ignorant person would endeavor to keep away from those parts of the machinery. The collar and set screw did not project much beyond the pulleys and belt, but were almost in their line of motion. Although the plaintiff says he did not know of the set screw, his testimony shows that he was well aware of the danger from the moving pulleys, belt, and shaft. He says in a variety of forms of expression that he was doing the best he could to keep clear of the pulleys, and that he was watching to protect himself as well as the hemp. He was more than forty years of age and had had considerable experience. There is nothing in the case to indicate that he needed any warning of the danger from coming in contact with this rapidly revolving machinery, whether he knew of

the set screw or not. Indeed, if the defendant had warned him, he would merely have been told that there was great danger of getting caught if he came in contact with that part of the machinery, and that he must use his best effort to avoid it. But it is evident that he knew all that without warning. It has been held in many similar cases that the accident was not imputable to negligence of the defendant. *Russell v. Tillotson*, 140 Mass. 201; *Ciriack v. Merchant's Woolen Co.*, 146 Mass. 182, and 151 Mass. 152; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *Crowley v. Pacific Mills*, 148 Mass. 228; *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Pratt v. Prouty*, 153 Mass. 333; *Tinkham v. Sawyer*, 153 Mass. 485; *Henry v. King Philip Mills*, 155 Mass. 361; *De Souza v. Stafford Mills*, 155 Mass. 476; *Rood v. Lawrence Manuf. Co.*, 155 Mass. 590; *Carey v. Boston & Maine Railroad*, 158 Mass. 228; *Hale v. Cheney*, 159 Mass. 268.

"The evidence of custom in other factories was immaterial. Assuming that it might have been competent as tending to show negligence of the defendant if the accident had happened to one there by invitation to do business with the defendant, it was of no consequence in view of the plaintiff's implied contract to work with the machinery which the defendant was then using. Exceptions overruled."

[The cases cited in the *ROONEY* case, *supra*, are reported or noted with the Massachusetts cases in this volume of AM. NEG. CAS.]

EMPLOYEE ADJUSTING BELT UPON PULLEY OF ELEVATOR CAUGHT BY SET SCREW—QUESTION FOR JURY.—In *DALEY v. AMERICAN PRINTING CO.*, 150 Mass. 77 (*November, 1889*), tort for personal injuries sustained while in defendant's service, employed in defendant's dye-house in its mill, plaintiff's exceptions to verdict directed for defendant in the Superior Court were sustained. The opinion delivered by C. ALLEN, J., states the case as follows:

"There was evidence tending to show that the plaintiff was employed on work which required him to use the elevator; that the elevator was operated by a belt which passed over a pulley situated about twenty feet from the elevator; that the belt was off the pulley; and that the plaintiff's injury occurred while he was putting it on, in order to enable him to use the elevator in doing his work. It seems to have become a question, at the trial, whether it was necessary for the plaintiff himself to attend to putting on the belt, under the circumstances which then existed. The plaintiff had been allowed, subject to an exception by the defendant, to show that there was nobody whose duty it was to put the belt on when it was off; and he afterwards called a witness, by whom he proposed to show

further that the belt was frequently off, how it was put on, and who put it on; and 'that there was not anybody specially charged with that; that everybody did it that had to use the elevator,— had to put the belt on.' This evidence was excluded. We think it was competent, as one important element of the plaintiff's case was to show that he was in the line of his duty in attempting to put on the belt at the time when he was hurt. The fact that the defendant afterwards introduced testimony to show that there was another man whose duty it was to put on the belts, serves to show the importance to the plaintiff of the evidence which was excluded; and indeed this also appears by the defendant's answer, as well as by the argument which has been addressed to us in its behalf. The jury might have believed the plaintiff's witness, if he had been allowed to testify, rather than the defendant's. This material evidence having been excluded, there must be a new trial, unless it can be seen that, even if it had been admitted and believed, still the verdict must have been for the defendant. The ground upon which the case was withdrawn from the jury is not stated. We cannot say, as matter of law, that no sufficient evidence was introduced or offered of negligence on the part of the defendant, or of freedom from negligence on the part of the plaintiff. He offered to show that the belt was frequently off. This evidence, if admitted, would have had a tendency to show that the machinery was not suitable, and that it needed frequent readjustment. The testimony in respect to the projection of the set screw, and to its subsequent removal, was in the same direction. If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care. The evidence bearing upon this point, as reported, is not altogether clear, and does not enable us to understand fully what it was necessary to do in order to adjust the belt, or how it was usually put on the pulley when it had got off. Exceptions sustained."

See subsequent decision in the Daley case, 152 Mass. 581 (next paragraph).

In **DALEY v. AMERICAN PRINTING CO.**, 152 Mass. 581 (*January, 1891*), tort, for personal injuries sustained by plaintiff, while in defendant's employ, by being caught by a set screw projecting from a collar on a shaft, as he was adjusting upon a pulley on the shaft a belt by which an elevator was operated in the defendant's print works, defendant's exceptions on verdict returned for plaintiff were overruled. See the former decision in the Daley case, 150 Mass. 77.

NOTES OF ELEVATOR ACCIDENT CASES.

Fall of elevator — Rope breaking — Question for jury.

In *AVILLA v. NASH ET AL.*, 117 Mass. 318 (March, 1875), employee in defendant's sugar refinery injured by fall of elevator caused by breaking of a rope, plaintiff's exceptions to verdict returned for defendants were *sustained*, it being held that the question of negligence was one of fact which should have been submitted to the jury.

Fall of elevator — Fellow-servant.

In *KELLEY, ADM'X v. BOSTON LEAD COMPANY*, 128 Mass. 456 (March, 1880), tort, for injury to plaintiff's intestate, an employee of defendant, caused by the fall of an elevator, judgment was rendered for defendant, there being no evidence that defendant was negligent, or that the accident happened other than by the negligent act of a fellow-servant.

Fall of elevator — Safety device — Statute.

In *BOURGO v. WHITE AND OTHERS*, 159 Mass. 216 (May, 1893), employee in defendants' tannery injured by fall of elevator, plaintiff's exceptions were *overruled*, the point being stated in the syllabus to the official report as follows: "The statute of 1882, c. 208, amending the Pub. Sts. c. 104, § 14, providing that 'all elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by' the inspectors of factories and public buildings, 'whereby the cabs or cars will be securely held in the event of accident to the shipper rope, or hoisting machinery, or from any similar cause,' requires that an elevator be provided with some suitable mechanical device, to be approved by the inspectors, designed for the purpose of securely holding the elevator in the event of an accident, and does not impose the duty of having such a mechanical device attached to the elevator as will surely and securely, under all circumstances, hold it in the event of an accident." Opinion by FIELD, CH. J.

Employee of lessee injured by fall of elevator in warehouse — Rules — Lessor not liable.

In *MCCARTHY v. FOSTER*, 156 Mass. 511 (June, 1892), tort, for personal injuries sustained by plaintiff by the falling of an elevator in defendant's warehouse, judgment was rendered on the verdict for defendant, the syllabus to the official report stating the case as follows: "An employee of the lessee of a store, knowing that all persons were forbidden by notices plainly posted, and with which he was familiar, to pass up or down upon an elevator while in motion, attempted to start the elevator in a mode which necessarily required him to be upon it while in motion, and the elevator fell and he was injured. Held, in an action for personal injuries against the lessor of the premises, that the plaintiff had no right to use the elevator as he was using it at the time of the accident, and the fact that he and others habitually disregarded the notices and rode up and down in violation of them, could not favorably affect his case, as the defendant was not in possession of the store, and had no notice that the elevator was used except for merchandise. Held, also, that it made no difference that, owing to the piling of merchandise against the slats enclosing the elevator well, the elevator could not be started from that floor of the store except by standing

on the elevator platform, or that there was some danger in starting it by handling the shipper ropes with the arm between the slats." Opinion by BARKER, J.

Employee struck by elevator — Master not liable.

In *MURPHY v. WEBSTER AND OTHERS*, 151 Mass. 121 (February, 1890), defendants' exceptions to verdict for plaintiff were *sustained*. The syllabus to the official report states the case as follows: "At the trial of an action to recover for personal injuries occasioned to the plaintiff while in the defendants' employ, by being struck by an elevator car in the defendants' factory, there was evidence that the plaintiff had for two months used the elevator in the course of his employment; that the shipping rod, by which the elevator was operated, although within the well, was not in the line of passage of the car, and it was unnecessary for him to expose any part of his person in handling it; that being on the first floor, and having occasion to use the elevator, which was at the second floor, he pushed up the shipping rod and the car did not come down; that he pushed it up again, and the car still did not come down; that, instead of going up stairs near by to the second floor, where all the machinery would have been open to his view, he then put his head into the well to see if there was any slack of the elevator rope, and then pushed up the shipping rod the third time; and that the car then came down and struck him, causing the injuries. *Held*, that there was no evidence of due care on the part of the plaintiff, and that he could not maintain the action."

At a subsequent trial of the Murphy case the trial judge ruled that plaintiff was not entitled to recover, and the Supreme Court rendered judgment on the verdict for defendant. See *MURPHY v. WEBSTER*, 156 Mass. 48 (February, 1892).

Employee struck by elevator — Fellow-servant.

In *HASTY v. SEARS*, 157 Mass. 123 (September, 1892), tort, for personal injuries occasioned to plaintiff by being struck by an elevator in defendant's building, judgment was rendered on the verdict for defendant. The syllabus to the official report sufficiently states the point decided as follows: "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him; and if the servant receives injuries in such employment from the negligence of a servant to whom he is lent, he cannot recover therefor."

Elevator operator in elevator well struck by elevator — Contributory negligence.

In *DEGNAN v. JORDAN ET AL.*, 164 Mass. 84 (June, 1895), judgment was rendered on the verdict directed for defendants in the Superior Court, Suffolk, the case being stated by MORTON, J., as follows: "The plaintiff was, at the time of the accident, an elevator tender in the employ of the defendants, and was forty-three years of age. He had been at work running the elevator about a fortnight, and, as he testified, understood the business fairly well. On the morning of the accident, he found the elevator below the level of the street floor, and tried, without succeeding, to open the door. Then he went down into the basement, as he had been told by the engineer to do in such a case. There he met a man by the name of Feehiley, who

told him that he could not move the elevator. Thereupon the plaintiff stooped into the elevator well under the elevator, which was four or five feet from the floor, so that the whole upper part of his body was under the elevator, for the purpose of reaching the elevator rope, which was in one corner, and as he pulled the rope the elevator came down on him, causing the injuries complained of. Neither the plaintiff nor Feehiley made any effort to report to the superintendent of elevators or to the engineer that there was anything wrong with the elevator. And we think that, in view of the notice he had from the situation of the elevator that something about it was probably out of order, his conduct in exposing himself to injury from its sudden descent was wanting in due care. *Murphy v. Webster*, 151 Mass. 121; S. C., 156 Mass. 48." * * *

Falling into elevator well — Statute — Master not liable.

In *TAYLOR, ADM'X v. CAREW MANUFACTURING CO.*, 143 Mass. 470 (February 1887), employee falling into elevator well, plaintiff's exceptions were *overruled*. The syllabus to the official report states the case as follows:

"Under the Pub. Sts. c. 104, §§ 14, 22, providing that the openings of elevators and well-holes upon every floor of a factory shall be protected in a manner specified, and that any corporation, being the owner of a factory, shall be liable for all damages suffered by any employee by reason of a violation of the statute, an employee cannot maintain an action against his employer for an injury caused by such violation, unless at the time he was injured he was in the exercise of due care.

"In an action for personal injuries to the plaintiff, while in the defendant's employ, by falling into an unguarded elevator well in the basement of the defendant's mill, there was evidence that the plaintiff was thirty-seven years old, and had been in the defendant's employ for four or five years; that by his contract he was to have a certain sum per day while learning, and more when he was taught; that all the floors of the mill, except the one where he was injured, were provided with self-closing hatches at the elevator openings; and that at the opening where the plaintiff fell it was so dark, by reason of the construction of the mill, that the opening could not be seen or discovered until reached. The plaintiff testified that he knew of the existence of the elevator well, and was looking for it to shun it when he fell into it; that he knew it was there somewhere, but did not know exactly where; that he was walking quite fast; and that he went into the elevator hole so quick that he did not know whether he was stepping long or short. Held, that there was no sufficient evidence of due care on the part of the plaintiff to entitle him to maintain the action." Opinion by GARDNER, J.

See, also, former decision in the *TAYLOR* case, where defendant's exceptions to verdict for plaintiff were *sustained*. *TAYLOR v. CAREW MANUFACTURING CO.*, 140 Mass. 150.

Falling down elevator well.

In *CONNORS v. MORTON ET AL.*, 160 Mass. 333 (January, 1894), tort, for personal injuries occasioned to plaintiff, while in the defendant's employ, by falling down the well of an elevator, operated by an engine, in a building in course of erection by defendants, verdict for defendants was sustained, and plaintiff's exceptions *overruled*.

Employee falling into elevator shaft—Knowledge of danger—Statute.

In *KEENAN v. EDISON ELECTRIC ILLUMINATING CO.*, 159 Mass. 379 (June, 1893), tort, for personal injuries sustained by plaintiff, a laborer in defendant's employ, by falling into an elevator shaft, which shaft was not provided with an automatic guard, as required by statute, and which fact was known by plaintiff, plaintiff's exceptions on verdict directed for defendant were *overruled*. HOLMES, J., rendered the following opinion: "We assume for the purposes of this decision that by reason of St. 1885, c. 374, section 110, the defendant was using the elevator illegally, and that the plaintiff did not share equally in the breach of law. We also assume that there was evidence of negligence on the part of the defendant towards the plaintiff. But the negligence, if any, consisted only in the failure to provide an automatic guard to the shaft; so far as appears, the defendant was not responsible for the elevator car having been moved. This being so, whether it be said that the plaintiff took the risk, or that he was negligent, or that the defendant's negligence was not the proximate cause of the injury, the result must be that the plaintiff cannot recover. For the plaintiff knew as well as the defendant that there was no guard to the shaft, and, we must presume, understood that, if the elevator car was not there when he pushed his coal car into the well, his car would tumble down the hole. In other words, he appreciated the danger so far as the defendant contributed to it. Although very possibly a guard would have prevented the injury, the plaintiff's conduct was nearer to the event. He did not rely on any such preventive, but took the chances of the elevator car being where he left it. Exceptions overruled."

Employee injured by machinery loaded on truck slipping from elevator—Contributory negligence.

In *MARVIN v. KITSON MACHINE CO.*, 159 Mass. 156 (May, 1893), tort, for personal injuries sustained by plaintiff while in defendant's employ as a general helper, caused by machinery falling upon him, plaintiff's exceptions on verdict directed for defendant were *overruled*, MORTON, J., stating the case as follows: "It appears that the plaintiff and a fellow-servant named Butterman were told by the superintendent to take a piece of machinery to the elevator, and that he (the superintendent) would follow, and help them, as soon as he got another man. The plaintiff and Butterman loaded the machinery on to a truck, of which no complaint is made, and took it to the elevator and then, without waiting for the superintendent to arrive, put it on the elevator. It caused the elevator to drop about an inch, and McAleer, the man who had charge of the elevator, and who was oiling it, the belt being off, shouted to them to take it off, and while they were doing so the wheels of the truck struck the curbing which surrounded the elevator well, and which was level with the floor, and caused the machinery to slip and injure the plaintiff. We do not see how, on this state of facts, it can be said that the plaintiff's injury was due to any negligence on the part of the defendant, or to anything except his own act and the act of Butterman, in trying, in consequence of what McAleer had said to them, to get the machinery off of the elevator after they had put it on without any direction from anybody. There was nothing to show that the injury was due to any defect in the elevator, and the testimony that was offered was therefore rightly excluded. It may be added, also, that the plaintiff's declaration.

fairly construed, does not allege that the injury was caused by any defect in the elevator, or in the ways, works, or machinery of the defendant. Exceptions overruled." (J. F. MANNING appeared for plaintiff; G. F. RICHARDSON and G. R. RICHARDSON [D. M. RICHARDSON with them] appeared for defendant.)

LA FORTUNE v. JOLLY AND ANOTHER.

Supreme Judicial Court, Massachusetts, November, 1896.

[Reported in 167 Mass. 170.]

INEXPERIENCED EMPLOYEE SET TO WORK TO LIGHT BOILER FIRE—EXPLOSION—FAILURE TO INSTRUCT—DANGEROUS PLACE TO WORK—MASTER LIABLE.—Where plaintiff, a chipper and helper in defendants' factory, was told by a son of one of the defendants to kindle a fire under one of the boilers in the factory, but he objected as he had never done it before, and on defendant's son insisting the plaintiff put shavings into the furnace, lighted them and continued to put in more shavings, and an explosion resulted and the door of the fire-box flew open and plaintiff was seriously burned, it was *held* that defendant's son represented the defendants and that the latter were liable for the former's neglect in failing to give plaintiff proper instructions and warning as to the danger. It was also *held* that where the danger was known to defendants but not to the plaintiff, and instructions were not given as to the same, it may properly be said that plaintiff was set to work in a dangerous place.

TORT, against James Jolly and William Jolly, copartners, as J. & W. Jolly, for personal injuries sustained by the plaintiff while in the employ of the defendants. At the trial in the Superior Court, before Maynard, J., the jury returned a verdict for plaintiff. Defendants alleged exceptions. The case is stated in the opinion.

W. H. BROOKS (W. HAMILTON, with him), for defendants.

M. F. DRUCE, for plaintiff.

Lathrop, J.—Under the ruling of the court, the only questions which are now before us arise under the first and third counts of the declaration, which are at common law. The first count alleges negligence on the part of the defendants in failing to instruct the plaintiff in his duties and to warn him as to the dangers thereof. The third count alleges that the defendants negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work.

The plaintiff was a chipper and helper in the defendants' factory, and his general duty was to chip and file off the rough

edges of castings, and to assist the other men when called upon to do so. On June 8, 1895, the plaintiff was told by John Jolly, a son of one of the defendants, to kindle a fire under one of the boilers on the morning of the next day, which was a Sunday. He objected, on the ground that he was afraid to do it, as he had never done it before. Jolly, however, insisted upon the plaintiff's obeying him, and the next morning the plaintiff put shavings in the furnace, lighted them, continued to stuff in more shavings, and, more than an hour after the fire was started, there was an explosion inside, the door of the fire-box flew open, and the plaintiff was seriously burned. There was evidence to show that the cause of the explosion was that too many shavings were put in at once, thereby stopping the draft and preventing the gas formed by the combustion from passing off by the chimney.

The defendants contend that it was not within the scope of the plaintiff's duties to light the fire under the boiler; but there was certainly evidence for the jury on this point. James Jolly, one of the defendants, testified that "it was the helpers' business to do what John Jolly told them," and that "it was a part of the helpers' business to light this fire." While it appears in evidence that the plaintiff was reluctant to build the fire, because, as he said, he had never done so before, and was afraid of danger from an explosion or from being burnt, yet it does not appear that he knew anything about any risk from the door of the fire-box blowing open. On the contrary, he testified that he never saw the door blow open before, although he had worked there for two years and two months. The risk was not an obvious one, nor can it be said, as matter of law, that, if he did not know it, he ought to have known it. The furnace and boiler were not used on week days to furnish power. The furnace was then used to burn the waste shavings. On Sundays the furnace and boiler were used for power. The plaintiff testified that he had been there on Sundays only twice before. The plaintiff had never before been called upon to make the fire and get up steam, this work being generally done by one Kelley, who was ill at the time of the accident. We are of opinion that, under these circumstances, it can not be said that, as matter of law, the plaintiff took the risk. One of the defendants, at least, knew that the door of the fire-box had been blown open several times before the accident, and the danger was obvious if the door should blow open. While this

defendant testified that he spoke on Saturday to his son John to start up the fire, and that he gave no instruction to his son with reference to the plaintiff's starting the fire, yet, as he also testified that it was the helpers' duty to do what John told them, we are of opinion that, if John directed a helper who did not know the danger to build the fire, and failed to give him proper instructions, he represented for this purpose the defendants, and they are liable for his neglect. *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214, 220, 15 Am. Neg. Cas. 615, *ante*.

On the third count, the defendants asked the court to instruct the jury as follows: "There is no sufficient evidence that the defendants negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work, and there can be no recovery on that ground." We are of opinion that this request was rightly refused. If we assume in favor of the defendants that there was no evidence that the furnace or boiler was defective or dangerous when a fire was properly made therein, yet if there was danger when a fire was made in the furnace by an inexperienced employee, who was ordered to make it, and this danger was known to the employer and not to the employee, and no instructions were given to the employee, it may properly be said that he is set to work in a dangerous place. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*. There was evidence for the jury upon all of these points.

The defendants offered to show that James Jolly gave instructions to his son John to start up the fire himself. Evidence of this was excluded, and the defendants excepted. We have already recited the testimony of James Jolly as to the authority of John to call upon the helpers to make the fire. If John had this general authority, evidence that this authority was secretly withdrawn on the particular occasion in controversy was incompetent, and was properly excluded.

Exceptions overruled.

NOTES OF ACCIDENTS CAUSED BY EXPLOSIONS.

Defective appliance — Drying machine — Explosion.

In *MORSE, ADM'X, v. GLENDON COMPANY*, 125 Mass. 282 (August, 1878), the case is stated in the syllabus to the official report as follows: "In an action against a corporation for personal injuries occasioned to an employee, there was evidence that the defendant had a machine for drying lumber by steam pressure, consisting of a cylinder made of boiler iron, open at one

end, to which was attached a rim and a door to be shut when in use; that the cylinder was made to order, but the rim and the door were purchased of a manufacturer; that the door when closed was held firmly in place by an arrangement of levers, screws, bolts and eye-bolts; that on the outer edge of the rim, under the edge of the door when shut, was a groove to be filled by a gasket to make the door steam-tight; that the president of the corporation directed its engineer, who had charge of all the engines and machinery, to set up the machine and put it in working order; that the rim with the door attached was properly riveted to the open end of the cylinder, and a gasket was procured and placed in position; and the machine was then examined and tested by official inspectors of steam boilers, and subjected to a pressure of one hundred pounds to the square inch, and certified to be sound and fit for use, and safe at a working pressure of sixty-six pounds to the square inch; that the engineer found that the gasket was too thin, and, under the test of the inspectors, the cylinder leaked; that he procured another gasket, and was engaged in fitting it in its place, when the employee joined him, and was told that he might take hold and help on the boiler, and he did so; that the second gasket was much thicker than the first, and there was difficulty in closing the door so that no steam would escape; that the door was shut twice as closely as possible, but each time, with a pressure of thirty-five pounds of steam, there was a leak; that the engineer then found that there was an unevenness where the ends of the rubber of the gasket lapped together, and made a new adjustment, closed the door, and let the steam on; that at a pressure of twenty pounds there was a slight leak; that the engineer started to let off the steam, when there was an explosion throwing open the door, and causing the injuries complained of. *Held*, that there was no evidence of negligence on the part of the defendant, either in the selection of the machine, or of the servant charged with the duty of putting it in order for use; and that the action could not be maintained." Plaintiff nonsuited. Opinion by ENDICOTT, J.

Boiler explosion — Employee scalded by steam.

In *BLANCHETTE, ADM'X v. BORDER CITY MANUFACTURING CO.*, 143 Mass. 21 (October, 1886), judgment was rendered on the verdict for defendant, the case being stated in the syllabus to the official report as follows: "A. was employed in a room in a mill where starch was made by being cooked by steam in a large boiler, which stood upon a raised platform, to which steps led. There were two covers to the boiler, each of which opened less than half way, and they were fastened by a button. It was part of A's work to let on the steam to the boiler and shut it off by means of a valve, when making starch. On a certain day, A., who had worked in the room three of four weeks, was upon the platform, the steam suddenly lifted the covers of the boiler, and steam and starch were blown out upon A., and he was seen shortly afterwards on the floor of the room upon his hands and feet, by the end of the platform, badly scalded. *Held*, in an action by the administrator of A.'s estate against the owner of the mill for such injuries, that this evidence did not sustain the burden of proof which was on the plaintiff of showing due care on the part of his intestate."

Explosion of water-gauge to boiler — Flying glass — Assumption of risk.

In *COUNSELL v. HALL*, 145 Mass. 468 (January, 1888), tort, for personal

injuries sustained by plaintiff while in defendant's employ, who, while running the boiler of a small steam engine was injured by the glass water-gauge exploding and a piece of glass flying into his eye, verdict for defendant was sustained, and plaintiff's exceptions *overruled*, the plaintiff, continuing to work after promise to repair defect was made, having assumed the risk.

Blasting — Dynamite explosion in stone quarry.

In *NEVEU v. SEARS*, 155 Mass. 303 (January, 1892), mason in defendant's employ injured by dynamite explosion in stone quarry, judgment was rendered on verdict for plaintiff. The facts are thus stated in the syllabus to the official report: "A mason employed in building a wall was furnished with stone blasted from a quarry at a distance, leased and worked by his employer. The blasting was done by inserting dynamite cartridges in holes drilled in the solid rock and exploding them by electricity; and the rock thereby detached was then split up by hand by workmen of the employer into blocks of a suitable size, and then brought by his teamsters to the wall. As the mason was trimming a block so furnished, an explosion resulted from a blow struck by him, and he was injured, and thereupon he brought an action against the employer for an alleged failure by him to use reasonable care in providing safe materials for the work. At the trial the evidence did not disclose the exact cause of the explosion." * * *

Explosion of cartridge left in revolver — Employee injured — Defendant liable.

In *ANDERSON v. DUCKWORTH AND ANOTHER*, 162 Mass. 251 (October, 1894), defendants' exceptions on verdict for plaintiff were *overruled*. MORTON, J., stated the facts as follows: "The work which the plaintiff was employed to do was to assemble revolvers. That is, he took the different parts, after they were prepared, and put them together, and saw that they worked properly. It was no part of his duty to try them with explosives or to work on loaded revolvers. There was obviously nothing dangerous in handling revolvers under such circumstances. After the revolvers were assembled, they were tested by one of the defendants, James Duckworth, by loading and firing them, and if they worked all right they were accepted, but if they did not they were returned to the assembler. There was evidence tending to show that Duckworth told the plaintiff, when he first went to work, that he would see that no unexploded cartridge was left in the magazines. On the day of the accident, Duckworth, after testing one of the revolvers, handed it back to the plaintiff, telling him that it did not work right. While the plaintiff was engaged upon it, a cartridge which had been accidentally left by Duckworth in one of the chambers exploded and injured the plaintiff. The defendants contend that the plaintiff was bound, in the exercise of due care, to examine the revolver himself, and was not justified in relying wholly upon the examination of Duckworth, especially in view of the fact, which the plaintiff knew, that Duckworth had once before left an unexploded cartridge in a revolver, which he handed back to the plaintiff after testing it." * * * The court said that the question of plaintiff's due care was properly for the jury to determine.

FALL OF WALL OF BUILDING BEING TORN DOWN — EMPLOYEE INJURED — DANGEROUS PLACE — QUESTION FOR JURY.— In **RYAN v. TARBOX**, 135 Mass. 207 (*June, 1883*), tort for injuries to plaintiff, an employee of defendant, by the fall of a wall of a building which was being torn down, plaintiff's exceptions on verdict returned for defendant in the Superior Court (Suffolk) were *sustained*. P. J. DOHERTY appeared for plaintiff; H. E. SWASEY & G. R. SWASEY, for defendant. The opinion was rendered by MORTON, Ch. J., and is as follows:

"Upon a careful examination of the evidence in this case, we are of opinion that the plaintiff had the right to go to the jury upon the question of the liability of the defendant.

"The defendant had contracted with the owners to tear down an old brick building. The plaintiff was employed by him as one of the laborers, and was injured by the fall of a part of one of the walls. This wall was built of two courses of brick, each four inches in thickness. The inner course supported a chimney extending down to the second floor, but not to the ground. There was evidence tending to show that, on the morning of the accident, Perkins, the foreman of the defendant, discovered a crack between the outer and the inner courses of the brick where the chimney was; that he notified the defendant of it, he being present in the direction and control of the work; that Perkins called the plaintiff to aid in putting up braces to prevent the wall from falling, and, while they were at work, the wall and chimney fell, carrying away a part of the floor on which they were at work, and injuring the plaintiff. Without going further into details, we think there was evidence tending to show that the defendant was personally present in charge of the work; that he knew that the wall was dangerous; that the plaintiff did not know that it was dangerous; and that the defendant set the plaintiff to work in this place of peculiar danger, without any warning or caution to him.

"The evidence should have been submitted to the jury, with instructions that, if they found such to be the facts, and also that the plaintiff, without negligence on his part, through inexperience, and in reliance upon the directions given him, failed to understand the risk, and was injured, the defendant would be responsible. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*; *O'Connor v. Adams*, 120 Mass. 427, 15 Am. Neg. Cas. 615, *ante*.

"The defendant contends that the only negligence, if any, was the negligence of Perkins, who was a fellow-servant of the plaintiff; and therefore that the defendant is not liable. We do not think that the question as to how far he would be responsible for the negligence of Perkins necessarily arises in the case. If he was in

charge of the work, he was responsible for the order given in his presence by Perkins to the plaintiff; it was his duty to warn the plaintiff of a danger and risk known to him and not known to the plaintiff; and, if he unreasonably neglected to do so, he was guilty of personal negligence, which would make him liable, irrespective of any question of the negligence of Perkins. *Walsh v. Peet Valve Co.*, 110 Mass. 23, 15 Am. Neg. Cas. 614, *ante*. Exceptions sustained."

Fall of building — Fellow-servant — Master not liable.

In *CONNORS v. HOLDEN*, 152 Mass. 598 (*January, 1891*), tort, by the administratrix of the estate of James Connors, to recover for personal injuries sustained by the intestate during his lifetime while in the employ of the defendant, verdict directed for defendant was *sustained*. Connors, the intestate, was employed by defendant as a laborer to assist in repairing a building owned by defendant, and was injured by the building under which he was at work falling upon him. The Supreme Court (per KNOWLTON, J.) said: "The only negligence alleged against the defendant in the plaintiff's declaration is, that she put the plaintiff's intestate to work in a dangerous place, knowing, or having good reason to know, that it was dangerous, and that she negligently omitted to inform him of the danger, of which he was ignorant. The evidence utterly fails to support the allegations of the declaration. The place in which the work was done was safe and proper, and the only negligence of which there is any evidence was that of the fellow-servants of the plaintiff's intestate in their manner of doing the work in which they were all engaged. For this the defendant is not liable. Exceptions overruled."

Fall of ice house — Master liable.

In *CUDDY v. PEOPLE'S ICE COMPANY*, and *THAYER v. PEOPLE'S ICE COMPANY*, 153 Mass. 366 (*February, 1891*), two actions of tort (tried together), for personal injuries sustained by the plaintiffs by the fall of defendant's ice house while employed in its construction by defendant, verdict for plaintiff in each case was sustained, and defendant's exceptions were *overruled*. Opinion by C. ALLEN, J.

Dangerous premises — Employee of lessee injured by fall of a shaft — Liability of owner.

POOR v. SEARS, 154 Mass. 539 (*October, 1891*), was an action against the owner of premises leased to plaintiff's employer, for injuries sustained by plaintiff by the fall of a shaft. The plaintiff recovered a verdict which was sustained by the Supreme Court.

The first paragraph of the syllabus to the official report states: "If the owner of a building, who is engaged in furnishing for hire steam power to adjoining buildings, after leasing a part of his building, continues thus to furnish power by means of appliances upon the leased premises, he is bound to exercise reasonable care to see that such appliances are in suitable condition to perform the work without danger to persons rightfully on the premises and themselves in the exercise of due care; and if he, or his servants or agents, are negligent in the use or management of such appliances, such a person in the employ of his lessee, who is injured thereby while in the exercise of due care, is entitled to recover of him for the injuries so sustained, irrespective of the lease, or of any duty of the lessee under it to care for such appliances." Opinion by MORTON, J.

LAYING FOUNDATION WALLS FOR BUILDING—EMPLOYEE INJURED BY FALL OF BANK OF EARTH.—In **O'DRISCOLL v. FAXON**, 156 Mass. 527 (June, 1892), tort, for personal injuries sustained by plaintiff, by the falling upon him of a bank upon defendant's premises, defendant's exceptions to verdict returned for plaintiff were *overruled*. "At the trial in the Superior Court (Suffolk), before BISHOP, J., there was evidence tending to show that the plaintiff, who was a stone mason, worked in the fall of 1889, for one James Smith in laying the foundation walls for a building on the defendant's premises, which extended from Kingston street to Edinboro street in Boston. The plaintiff testified that, at about half past four o'clock in the afternoon of November 4, one Knight, Smith's foreman, sent him down to a part of the wall on Edinboro street, seven or eight feet from where he had been at work; that he looked at the wall, and told Knight that there was not room, and the bank must be cut; that he measured it, and there were only twenty-two inches, and the wall was to be two feet four inches; Knight turned round to the defendant Faxon, and said, 'I want a man to cut this bank, we haven't room;' that Faxon told one William Vanderbeck, 'You had better go up and cut that bank;' that he, the plaintiff, then went away to the higher part of the wall, six to eight feet distant, and remained there until Knight called him, and said it was ready; that he then returned and had laid one stone, and had the mortar spread for another, and stood upon the wall to lay the stone back to the bank, leaning forward facing into the cellar; that the wall upon which he was standing was about four and one-half feet high from the cellar bottom; that while so standing he was struck by earth that fell from the bank in the rear of him, and thrown down from the wall; and that the next he knew he was down on the cellar bottom, having received severe injuries. The plaintiff testified on cross-examination, that

he did not look at the bank after it was cut; that there is always more or less breaking and scaling off in a bank; that there had been three or four shores against the bank; and that one which had been against it about where the earth fell that threw him off the wall had been removed in the forenoon of the day he fell to admit of the letting in of the stone he was to lay." * * *

The official report of the case sets out the evidence and the charge to the jury at length.

In delivering the opinion by the Supreme Court, ALLEN, J., said: "The defendant contends that the plaintiff did not show that he was in the exercise of due care, and that for this reason the case should have been withdrawn from the jury. In support of this view it is urged that, after the cutting of the bank by Vanderbeck, the plaintiff, who was a mason of long experience, went to work under it without looking to see the effect of the cutting; that he stood upon the wall with his back to the bank; that there is always more or less breaking and scaling off in a bank; and that he ought to have anticipated that the bank might fall, knowing as he did that a shore which had been used to support it had on the morning of that day been removed. But there was evidence tending to show that the shore had been removed as a matter of necessity, in order to allow the prosecution of the work upon the wall; that no actual crumbling or breaking away of the bank was visible after the cutting, so that looking at it would not have disclosed anything of the kind; that the cutting was slight; that the bank was hard and stiff and safe to dig into, if the digging was not too deep; that Knight, the foreman, told him it was ready; and we think it was rightly left to the jury to determine whether at the time of the plaintiff's injury the danger was so imminently threatening, from the general liability of the bank to break away, as to make it careless for the plaintiff to continue his work under the direction of his foreman in building the wall. There was some conflict of evidence, and we cannot say on uncontradicted evidence that the plaintiff was not entitled to go to the jury. It was also a question for the jury to determine whether it was consistent with due care for him while at work to stand as he did upon the wall. The defendant further contends that upon the whole evidence no want of due care on his part was shown; and in support of this view it is urged that no notice was given to him that the bank was dangerous; that the plaintiff and his witnesses did not regard it as dangerous; that if the plaintiff, with his experience, was not guilty of carelessness in working under the bank, the defendant was not guilty of carelessness in failing to anticipate that earth from the bank might fall upon the plaintiff; and that, if the cutting of the bank was such as to cause no reasonable apprehension of danger, then the falling of

the earth was a mere accident. But we think the jury might be allowed to take a broader view of the defendant's responsibility. The duty rested upon him of using reasonable care in providing a safe place for the masons to do their work in building the wall, and the jury might hold him bound to use reasonable care to guard against accidents which at the moment of their occurrence a workman might not anticipate, though himself in the exercise of reasonable care under the circumstances in which he was placed. *Holden v. Fitchburg R. R.*, 129 Mass. 268, 276, 15 Am. Neg. Cas. 433, *ante*; *Ryan v. Tarbox*, 135 Mass. 207, 15 Am. Neg. Cas. 644, *ante*; *Elmer v. Locke*, 135 Mass. 575, 15 Am. Neg. Cas. 487, *ante*. There was some evidence tending to show that the general plan which was adopted for protecting the bank from falling was inadequate. If the jury were of opinion that it was so, and that the defendant failed to use reasonable care in making it safe against accidents, they might lawfully hold him responsible to one who was himself in the exercise of due care at the time of the injury. Such seems to have been the view taken by the jury, and we cannot say, upon the evidence that it was the duty of the presiding justice to withdraw the case from their consideration." * * *

FALL OF BEAM UPON MASON—BREAKING OF TACKLE—INDEPENDENT CONTRACTOR—FELLOW-SERVANT.—In **HARKINS, ADM'R, v. STANDARD SUGAR REFINERY**, 122 Mass. 400 (*March, 1877*), judgment was rendered on verdict directed for defendant in action for damages for death of plaintiff's intestate, a mason employed on a building of defendant, caused by the fall of a beam upon him. The cause of the accident was the breaking of the tackle used by the riggers engaged in raising the beam. The rope and tackle were furnished by the master rigger. In rendering judgment, Endicott, J., said: "The rigger was either the servant of the defendant, or a contractor having exclusive control of the work he had contracted to do. If he was a contractor, the defendant would not be liable for any injury caused by his negligence, whether arising from the selection of his tackle, or the manner of using it. *Connors v. Hennessey*, 112 Mass. 96, and cases cited. If not a contractor, but a servant, then he and those employed under him to do the hoisting were fellow-servants with the master mason and the men employed as masons under him, of whom the plaintiff's intestate was one." * * *

Continuing the Court said: "This case is also clearly distinguishable from other cases cited by the plaintiff, where the employer himself furnished the appliances, or was in some way directly connected with or instrumental in their construction or use. *Summer-*

sell *v. Fish*, 117 Mass. 312; *Arkerson v. Dennison*, 117 Mass. 407, 15 Am. Neg. Cas. 611, *ante*.

"No evidence was offered that the defendant was negligent in the selection of any of its workmen. Nor is there any evidence that the beam was raised under the direction of its superintendent, or that the manner of raising it was pointed out by him. The general statement that the superintendent gave orders to the mason, riggers and others, telling them what to do, does not imply that he directed them in what way or manner they were to do their work.

"If therefore the riggers brought an imperfect rope, the defendant was not liable for injuries resulting to the plaintiff's intestate from its breaking; nor is the defendant liable if the riggers used the rope carelessly and improperly, and so caused it to break.

"In either aspect of the case, whether the master rigger was a contractor having exclusive control of his department, or a servant acting under the general direction of the defendant, the ruling of the presiding judge in ordering a verdict was correct. Judgment on the verdict."

EMPLOYEE STRUCK BY FALLING OBJECT — HOISTING APPARATUS — INDEPENDENT CONTRACTOR.— In **ROBINSON v. BLAKE MANUFACTURING CO.**, 143 Mass. 528 (*February, 1887*), defendant's exceptions to verdict returned for plaintiff were *sustained*. The case is stated in the syllabus to the official report as follows:

"In an action against a corporation for personal injuries, the plaintiff's evidence tended to show that the defendant contracted with another corporation to take out a condenser and put in a new one, and for that purpose sent to the latter's place of business one A. as its agent, with authority to employ all necessary labor and materials to do the work; that A. employed the plaintiff and others to assist him in the work, and asked the plaintiff if he had any blocking, to which the plaintiff replied in the affirmative, and A. told him to get it, which direction the plaintiff repeated to another, who procured three blocks and a piece of joist for a cross-bar; that, under A.'s direction, one block was placed on one side of a hole in the floor of a room, and the other two blocks were placed in a similar position on the opposite side of the hole, one on top of the other, the cross-bar was placed across the hole upon the blocking, a chain cable was attached to the cross-bar by a strap, and hung down through the hole, and the whole arrangement was used as a hoisting apparatus; that none of the blocking was fastened; and that, while so used for hoisting, the blocking slipped and the cross-bar came down the hole, and injured the plaintiff. The plaintiff also offered evidence that, with the articles actually used in constructing the hoist-

ing arrangement, and no more, it could not be made safe for the work to be done. There was no evidence that anything broke, or that the materials were defective. *Held*, that it could not be ruled, as matter of law, that it was the duty of the defendant to furnish the materials. *Held*, also, that if it was the duty of the defendant to furnish materials, and the accident was caused by an error of judgment on the part of A. in not fastening the blocks together, the plaintiff could not recover, in the absence of evidence that means of fastening could not readily have been had." Opinion by C. ALLEN, J.

DERRICK APPLIANCE BREAKING AND STONE FALLING UPON EMPLOYEE—ASSUMPTION OF RISK.—In **KILROY v. FOSS AND ANOTHER**, 161 Mass. 138 (*March, 1894*), tort, for personal injuries sustained by plaintiff while in defendants' employ, verdict directed for defendants in the Middlesex Superior Court was sustained, and plaintiff's *exceptions overruled*. The opinion rendered by BARKER, J., states the case as follows: "The plaintiff was helping to unload stones raised from a wagon and swung into place by a hand derrick. His work was to guide them by a tag-rope, which was long enough to enable him to work in safety, and was provided for that purpose. He knew that there was danger that the chain by which a stone was suspended from the derrick might break and the stone fall. There was an open space three feet wide between the line of the stone which fell and a pile of stones on which it was to be put, and in passing from one place to another in order to guide a stone he so walked in this open space as to bring his foot directly under the stone, when the chain broke and the stone fell. He might have gone another way by stooping down or crawling under a wagon and passing his rope around a tree, in which case he would not have been exposed to injury by the fall of the stone, and he might have traversed the open space without putting his foot under the stone. He was an experienced hand, had no occasion for haste, and had full control of his own movements and of the methods in which he did his work. There was no good reason for placing his foot under the stone, and none, except that it was less convenient, why he should not avoid all possible danger by going farther around and stooping under another wagon. When, under such circumstances, he chose to place his foot under a stone which he knew might fall, he voluntarily assumed a risk which was obvious, and his act was careless. He may have thought the risk was not great, but there was no adequate reason why he should incur it. and he assumed it voluntarily, when his employer had furnished him with the means of doing his work in safety. The cases of *Hackett v. Middlesex M'f'g Co.*, 101 Mass. 101, 15 Am. Neg. Cas. 526, *ante*, and *Spicer v. South Boston Iron*

Co., 138 Mass. 426, 15 Am. Neg. Cas. 611, *ante*, relied on by the plaintiff, are not in point. In each of those cases the plaintiff was injured by the fall of part of a permanent structure, which he had a right to believe was in no danger of falling, while in the case at bar the appliances were in their nature temporary, and the danger that the stone might fall by the breaking of a chain was known and understood. In the cases cited it was expected that the persons injured might in the usual course of their employment place themselves where they would be hurt if the structure above them gave way, while in the case at bar the plaintiff need not have placed himself under the stone, and was furnished with the tag-rope to enable him so to work as not to expose himself to injury if a stone should fall. Exceptions overruled."

FALL OF ROCK IN SULPHUR MINE—EMPLOYEE INJURED—DANGEROUS PLACE TO WORK—MASTER LIABLE.—In **BURGESS v. DAVIS SULPHUR ORE COMPANY**, 165 Mass. 71 (*January, 1896*), employee in defendant's sulphur ore mine injured by fall of overhanging rock, defendant's exceptions to verdict returned for plaintiff were *overruled*. KNOWLTON, J., said: "While the plaintiff was working at a place where he had been directed by the defendant to work, a piece of overhanging rock about five feet long and three feet wide fell upon him and injured him. So far as the defendant could ascertain by the exercise of reasonable diligence, it was its duty to know that the place was reasonably safe before setting the plaintiff at work there. There was evidence that the defendant's superintendent, for whose negligence it is agreed that the defendant is liable, knew of this loose stone before he told the plaintiff to work there and that he made an unsuccessful attempt to dislodge it. The jury might well find that he was negligent, either in not bringing it down, or in failing to discover that it was so likely to fall as to make other measures necessary for the protection of the workmen before resuming work on the benches below.

"Although some of the testimony tended to show that the plaintiff was negligent, there was other evidence from which the jury might find that he was in the exercise of due care. He testified that the superintendent told him where to go to work, and in reply to the question whether the ground, that is, the wall of rock above, was all right, said, 'Yes, it is all right; we tried to bar down some rock and it would not come.' He also testified that there was smoke there from a blast, so that he and his companions could hardly see their work, which was drilling. It appeared that the only light which they had was from oil lamps carried in their hats. It was the duty of the superintendent, and not of the plaintiff, to see that

the mine was kept safe for the workmen employed there, and the plaintiff might well trust somewhat to him. The assurance which the plaintiff testified was given to him by the superintendent showed that the condition of the place in regard to safety had been brought to the superintendent's attention. We are of opinion that it was a question of fact for the jury whether the plaintiff was reasonably careful in working where he did at the time of the accident.

"It is argued that he should be held, as matter of law, to have assumed the risk of such an accident as this. In regard to dangers arising from an employer's negligence, the doctrine that a voluntary assumption of the risk precludes recovery is of practical application only when the risk is understood and appreciated by the employee, and is not assumed under such constraint of any kind as deprives the act of its voluntary character." * * *

EMPLOYEE INJURED BY FALL OF TELEGRAPH POLE
—USE OF TOOL NOT FURNISHED BY MASTER.—In **CARROLL v. WESTERN UNION TELEGRAPH CO.**, 160 Mass. 152 (November, 1893), plaintiff's exceptions were *overruled*, the opinion by HOLMES, J., stating the case as follows: "This is an action for personal injuries caused by the fall of a telegraph pole upon the plaintiff. The plaintiff and other workmen were engaged in raising the pole. For the purpose of supporting it while partly up they used a tool called a deadman, which was a kind of crutch or pole with a half moon at the end, presenting its concave edge to the telegraph pole. This broke, whereupon the foreman who was directing the job told the men who held it to throw it away and take a shovel. The shovels on hand were long-handled shovels with pointed ends. One of these was taken, and of course presented a convex instead of a concave edge to the telegraph pole, which forthwith slipped and fell upon the plaintiff. We assume that the plaintiff was a servant *pro hac vice* of the defendant, but we do not see how the injury can be said to be the result of a failure of the defendant to do the duty of an employer. The immediate cause of the pole's slipping was the use of a shovel by a fellow-servant. We assume that the shovel was not a proper tool for the purpose, but it was not furnished for the purpose by the defendant. The plaintiff, as we understand, contends that his party was reduced to using it by the breaking of the deadman and the absence of other tools, coupled with the fact that the pole was to be raised at that time, and thus that the defendant was responsible for the situation. The short answer is that there is no evidence that the defendant did not furnish a sufficiency of proper tools at the depot from which those which were used were taken, or within convenient reach, and that, when proper appliances of this sort are furnished by the employer within convenient reach in a case like the present, he has done his

whole duty, and is not bound to see that every gang of workmen take as many tools as the event may show to have been desirable. *Zeigler v. Day*, 123 Mass. 152, 153; *Johnson v. Boston Towboat Co.*, 135 Mass. 209. Exceptions overruled." (C. HAGGERTY and J. R. KANE, and A. J. BARTHOLOMEW, appeared for plaintiff; A. LORD, and W. A. GILE, for defendant.)

EMPLOYEE INJURED BY FALL OF SLIDING DOOR — ASSUMPTION OF RISK.— In **CUNNINGHAM v. MERRIMAC PAPER CO.**, 163 Mass. 89 (*February, 1895*), plaintiff's exceptions to verdict directed for defendant were *overruled*, the opinion being rendered by HOLMES, J., as follows: "This is an action for personal injuries. At the trial, the judge directed a verdict for the defendant, and the case is here on exceptions. The plaintiff, a day laborer in the defendant's employ, was hurt by the falling out upon him of a sliding door. This door moved up and down in grooves, and in its proper state was balanced by weights fastened to it by ropes running over pulleys, like a common window, but at the time of the accident the weights were off the ropes. The plaintiff testified that the door had been in this condition for a long time, and that if the weights had been on he would not have been hurt, which last is plain. If he had notified the defendant's carpenter, there was evidence that the weights would have been replaced; but he had not notified him, and it was not the carpenter's duty to inspect the door of his own motion. Having occasion to go through the door, the plaintiff lifted it by main strength, and, as he was reaching for a stick to hold it up, it fell upon him. On these facts, we are of opinion that, whether it be said that the plaintiff took the risk, or that he was negligent, the ruling was right. The plaintiff knew that the door was not in the condition in which it was intended to be used, and that it wanted the appliance which would have made it safe. No doubt there was evidence that the grooves were defective, and it may be assumed that they could have been made so that they would have held the door even without the ropes and weights. But the door was not made to be used in that way, and the defendant was not bound to look out for its being used in that way. The defendant's negligence, as a ground of liability, begins and ends with not having the weights on and the door in proper running condition. As the plaintiff understood as well as any one what the actual condition was, and probably might have had it mended, he was not entitled to demand, instead of repairs, such further and secondary precautions as would make it safe for him to go on and use the door in an unnatural way. Exceptions overruled." (C. A. DE COURCY & W. COULSON, appeared for plaintiff; W. I. BADGER, for defendant.)

LOAD OF COAL DUMPED THROUGH HATCHWAY IN ROOF OF COAL SHED AND STRIKING EMPLOYEE.—In **FLYNN v. CAMPBELL et al.**, 160 Mass. 128 (*November, 1893*), the case is sufficiently stated in the syllabus to the official report, as follows: "A. was employed by B. to wheel coal from a coal shed to a fire-room. While he was shoveling coal in the shed, a load of coal was dumped through a hatchway in the roof, striking and injuring him. A. had been in B.'s service for four years and a half, and knew the way in which coal was put into the shed, but did not know the exact time when it would be done. The coal was brought up on lighters by a canal, and discharged from the lighters into the shed. During his employment, A. had never been warned by B. when coal was to be delivered. *Held*, that there was no breach of duty on B.'s part upon which A. could found an action for his injury."

EMPLOYEE UNLOADING CAR STRUCK BY HANDLES OF TRUCK.—In **HOWARD v. HOOD**, 155 Mass. 391 (*January, 1892*), tort for personal injuries sustained by plaintiff while in defendant's employ, verdict directed for defendant was sustained. In rendering the opinion, LATHROP, J., said: "So far as we can gather from the testimony, the plaintiff was working with Lowney, a fellow-servant, who also, it may be fairly inferred, exercised some control over him, to unload a car standing on a railroad track near a building of the defendant. Lowney placed a movable platform or run from the car to the floor of the building, took a truck, loaded a box upon it, and wheeled it over the run. He then directed the plaintiff to unload the car. The plaintiff wheeled one box over the run, and, while drawing the second or third load, the run slewed out of position, and the plaintiff was struck by the handles of the truck, and was injured. There is no evidence that the run was not properly made. It does not clearly appear what caused the run to get out of position, and the only negligence imputed to the defendant is that the run was not securely fastened. There is no evidence that such a run was usually fastened. The defendant was not present at the time, and the plaintiff and Lowney were left to do the work in their own way. Although Lowney exercised some supervision over the plaintiff, yet they were fellow-servants; and if Lowney was negligent in setting the plaintiff to work on the run, without fastening it, if this was required, his negligence is not to be imputed to the defendant. *Kelley v. Norcross*, 121 Mass. 508; *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *McKinnon v. Norcross*, 148 Mass. 533, 537; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183."

FALL OF TACKLE BLOCK AND CHAINS—SERVANT INJURED BY NEGLIGENCE OF FELLOW-SERVANT—RIGHT OF ACTION.—In **OSBORNE v. MORGAN AND OTHERS**, 130 Mass. 102 (*January, 1881*), action of tort against defendants, who were fellow-servants of plaintiff, for injuries sustained by plaintiff owing to the alleged negligence of defendants, plaintiff's exceptions to the ruling of the trial court sustaining demurrer were *sustained*, it being held that one servant may bring an action against another servant for injuries sustained by the former by the negligence of the latter. In rendering the opinion the Supreme Court (per GRAY, Ch. J.) said:

"The declaration is in tort, and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent and the others agents and servants of the corporation being employed in that business, negligently, and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Upon these facts the plaintiff was a fellow-servant of the defendants; *Farwell v. Boston & Worcester R. R.*, 4 Met. 49, 15 Am. Neg. Cas. 407, *ante*; *Albro v. Agawam Canal Co.*, 6 Cush. 75 (1); *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433, 15 Am. Neg. Cas. 426, *ante*; *Holden v. Fitchburg R. R.*, 129 Mass. 268, 15 Am. Neg. Cas. 433, *ante*; *Morgan v. Vale of Neath R'y*, 5 B. & S. 570, 736, and L. R. 1 Q. B. 149.

"The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice Merrick, in *Albro v. Jaquith*, 4 Gray, 99, in which it was held that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskilfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of opinion that the judgment is supported by no satisfactory reasons, and must be overruled." (2) * * *

1. *ALBRO v. AGAWAM CANAL CO.*, 6 Cush. (Mass.) 75, discusses the fellow-servant rule. sufficiently stated in the opinion in the case at bar.

See, also, *PARSONS v. WINCHELL*, 5 Cush. (Mass.) 592, which turns on

2. *Albro v. Jaquith*, 4 Gray, 99, is

"In the case at bar, the negligent hanging and keeping by the defendants of the block and chains, in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but it is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. *Hawkesworth v. Thompson*, 98 Mass. 77; *Norton v. Sewall*, 106 Mass. 143; *May v. Western Union Tel. Co.*, 112 Mass. 90; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 305; *Ames v. Union R'y*, 117 Mass. 541; *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skivington*, L. R. 5 Ex. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan R'y*, 4 C. P. D. 267, and 5 C. P. D. 157. This case does not require us to consider whether a contractor or a servant, who has completed a vehicle, engine or fixture, and has delivered it to his employer, can be held responsible for an injury afterwards suffered by a third person from a defect in its original construction. See *Winterbottom v. Wright*, 10 M. & W. 109; *Collis v. Selden*, L. R. 3 C. P. 495; *Albany v. Cunliff*, 2 Comst. 165; *Thomas v. Winchester*, 2 Selden, 397, 408; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 127.

"It was further suggested in *Albro v. Jaquith*, 4 Gray, 99, that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed to understand

the question of the right of an injured but it was held that in such cases the servant to sue a fellow-servant guilty master and servant cannot be made of the negligence causing the injury, co-servants.

and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation, in some measure, upon the extent of the hazard he assumes; and that 'the knowledge, that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all.' The cases cited in support of these suggestions were *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49, 15 Am. Neg. Cas. 407, *ante*; and *King v. Boston & Worcester R. R. Co.*, 9 Cush. 112, 15 Am. Neg. Cas. 413, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

"Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from, each other. It may be well doubted whether a knowledge, on the part of the servants, that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice Shaw, in *Farwell v. Boston & Worcester R. R. Co.*, *supra*, of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their employer of any misconduct, incapacity, or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion) that the rule exempting the master from liability to one servant for the fault of a fellow-servant did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty, and at a distance from each other. 4 Met. 59-61.

"So far as we are informed, there is nothing in any other reported case, in England or in this country, which countenances the defendants' position, except in *Southcote v. Stanley*, 1 H. & N. 247; s. c. 25 L. J. (N. S.) Ex. 339, decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron Pollock and Barons Alderson and Bramwell severally delivered oral opinions at the close of the argument. According to one report, Chief Baron Pollock uttered this dictum: 'Neither can one servant maintain an action against another for negligence while engaged in their common employment.' 1 H. & N. 250. But the other report contains no such dictum, and represents Baron Alderson as remark-

ing that he was 'not prepared to say that the person actually causing the negligence (evidently meaning "causing the injury," or "guilty of the negligence") whether the master or servant, would not be liable.' 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow-servant was admitted in two considered judgments of the same court, the one delivered by Baron Alderson four months before the decision in *Southcote v. Stanley*, *supra*, and the other by Baron Bramwell eight months afterwards. *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland R'y*, 1 H. & N. 773, 781. It has since been clearly asserted by Barons Pollock and Huddleston. *Swainson v. N. E. R'y*, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Hinds v. Harbou*, 58 Ind. 121, 14 Am. Neg. Cas. 459; *Hinds v. Overacker*, 66 Ind. 547, 14 Am. Neg. Cas. 460; *Griffiths v. Wolfram*, 22 Minn. 185." Exceptions sustained.

MASON INJURED BY FALL OF STAGING—APPLIANCE BREAKING—MASTER NOT LIABLE.—In **COLTON v. RICHARDS**, 123 Mass. 484 (*January, 1878*), tort, for personal injuries sustained by plaintiff by the fall of a staging upon which plaintiff was at work in defendant's employ, plaintiff's exceptions on verdict returned for defendant were *overruled*, the opinion rendered by COLT, J., stating the case as follows:

"The plaintiff fell from an imperfect staging, while at work erecting a mill as a mason in the employ of the defendant. To maintain an action against his employer for an injury so caused, the plaintiff must establish some neglect of a duty on the part of the defendant, arising out of the relation between them, which was the direct cause of the injury. In this case, the only cause was the breaking of a small piece of imperfect timber called a putlog, on which the floor of the staging rested. In all other respects, so far as it appears, the scaffolding was built upon a suitable plan, and, with the exception stated, of suitable materials.

"The plaintiff contended that it was the duty of the defendant to furnish a staging for the plaintiff, as a completed structure, ready for use in his employment, or at least to employ suitable and adequate material for its construction. He also contended that the putlog was a prepared utensil, made and fitted to be used for a defined and well known purpose, which it was the defendant's duty to provide.

"Upon these several points, the judge gave full instructions, which sufficiently covered the plaintiff's requests. These instructions stated the rule, that where the master undertakes to furnish suitable structures, appliances or materials, for the use of his ser-

vants in the performance of their work, or for the erection of the structures required in its performance, he is bound to use ordinary care only, whether he is to furnish a temporary staging as a completed structure, or the materials for the same, or only a single implement for use as a manufactured utensil.

"Under these instructions, with nothing more, the jury must have found either that the defendant did not assume the alleged duty in any of the forms suggested, or that the duty, whatever it was, was faithfully performed.

"After these instructions had been given, the court, at the defendant's request, further ruled, in substance, that if the defendant employed competent men to take charge of the erection of this building and of the staging necessary, and furnished suitable material therefor, he would not be liable, if a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog, by the breaking of which the plaintiff was injured; and added, that the defendant would not be liable, if he used ordinary care and prudence in the selection of competent workmen and materials, from which the staging was made.

"It is objected by the plaintiff that this last and additional sentence does not state the full measure of the defendant's duty, when, as master, he takes upon himself the business of furnishing a completed staging for the use of his workmen. In such case, it may indeed be true that the exercise of due care in selecting men and materials will not always satisfy the obligation assumed. It may still be his duty, especially when he superintends the work himself, to see that the completed structure is in itself reasonably safe and fit for the uses to which it is devoted.

"But this last statement appears to have been only intended to apply to a case where the duty of the master did not include the building of the staging, but ended with the supply of materials. The judge had just told the jury that, if the defendant was to furnish a completed staging, he was bound to use such care as a person of ordinary prudence would use in providing such a structure. This was sufficiently definite in the absence of any request for more specific instructions. The plaintiff relied on the defendant's neglect of duty in several forms, as we have seen, and the instructions asked by the defendant, taken together, imply that they all refer only to that which related to the supply of suitable material for the work. They expressly refer in terms to the case where the plaintiff and his fellow workmen are employed, to take charge not only of the erection of the building, but of the necessary staging also, and where the defective timber is selected by a fellow workman, not working under the superintendence of the defendant or his agent. As applied to such a case, all parts of the instructions given at the

defendant's request are correct and consistent; and the plaintiff's objection is not well taken. *Kelley v. Norcross*, 121 Mass. 508, 15 Am. Neg. Cas. 608, *ante*; *Arkerson v. Dennison*, 117 Mass. 407, 15 Am. Neg. Cas. 611, *ante*; *Ford v. Fitchburg R. R.*, 110 Mass. 240, 15 Am. Neg. Cas. 427, *ante*. See also *Allen v. New Gas Co.*, 1 Exch. Div. 251; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

"A majority of the court are of the opinion that the entry in this case must be: Exceptions overruled."

EMPLOYEE FATALLY INJURED BY FALLING FROM PLATFORM—MENTAL SUFFERING—BURDEN OF PROOF—DAMAGES.—In **KENNEDY, ADM'X v. STANDARD SUGAR REFINERY**, 125 Mass. 90 (*July, 1878*), exceptions to verdict returned for plaintiff for \$1,250 were *sustained*, the opinion by MORTON, J., stating the case as follows:

"The plaintiff's intestate while at work upon a platform, by reason of a defect, for which the defendant is liable, fell a distance of about twenty feet to the ground. The evidence tended to show that he became unconscious immediately upon striking the ground, though there was conflicting evidence as to whether he regained consciousness before his death which occurred about thirty-six hours after the accident (1).

"The instruction that the cause of action survived was correct. Even if the intestate became instantly insensible and so remained until his death, so that nothing could be recovered for any physical or mental suffering, yet the plaintiff might be able to show substantial damages in the expenses and loss incurred before death, by reason of the accident. *Bancroft v. Boston & Worcester R. R.*, 11 Allen, 34. The defendant now concedes the correctness of this

1. See, also, *MORAN, ADM'X v. HOLINGS AND ANOTHER*, 125 Mass. 93 (*July, 1878*), two actions of tort, the first by plaintiff, as administratrix, for personal injuries to her intestate, a boy sixteen years old, while in defendant's employ, and the second as surviving parent, for loss of services arising from same accident, decided on authority of *KENNEDY v. STANDARD SUGAR REFINERY Co.*, 125 Mass. 90 (the case at bar), it being held that plaintiff, in either case could not maintain the action. At the trial in the Superior Court [Suffolk] before Dewey, J., the plaintiff offered to show that, by reason of the negligence of the defendants, Carey fell a dis-

tance of forty feet, through four hatchways, and was instantly killed by striking on the lower floor of the defendants' building. The plaintiff also contended that Carey, in falling through the hatchways, might have struck against some obstacle, thereby receiving injuries from which he might have recovered, but no evidence was offered on this point, except as above stated. Upon the foregoing offers of proof, the judge ruled that the actions could not be maintained; and directed the jury to return a verdict for the defendants in each case. The plaintiff alleged exceptions. Exceptions overruled.

instruction, and excepts only to the last clause, which it contends allowed the jury to find substantial damages for the mental suffering of the intestate from the time he fell until he struck the ground. The only question we have to consider is the correctness of this last instruction.

"It may be true, as an abstract proposition of law, that if a man is precipitated from a height by the negligence of another, and is injured, he may recover, as one element of his damages, for any mental suffering he may prove he endured during his fall. But we think that the instruction, applied to the facts of this case, had a tendency to mislead the jury to the prejudice of the defendant.

"The plaintiff was entitled to recover only such damages as she proved were sustained by her intestate. The burden of proof was upon her to show that the intestate endured mental suffering during the fall, before the jury could allow any damages on that account. But the evidence in the case showed that the intestate became unconscious upon striking the ground. The fall occupied but an instant of time. He could not furnish and did not furnish any proof as to his mental condition during the fall. Whether he suffered any mental terror or distress is purely a matter of conjecture. The plaintiff therefore could recover nothing on this account. But the instruction given naturally led the jury to suppose that they might give the plaintiff substantial damages for the mental suffering of the intestate during the fall.

"The jury returned a verdict for the plaintiff for a considerable sum. It may be that the verdict was based upon a finding that the intestate regained his consciousness before his death, and thus was entitled to substantial damages for his bodily and mental sufferings. But it may be that the jury found that he remained unconscious until his death, and that they awarded substantial damages for his mental suffering during the fall and before he became unconscious. We are therefore of opinion that there should be a new trial. Exceptions sustained."

PAINTER INJURED BY FALL OF STAGING—ERECTION OF SCAFFOLD BY CONTRACTOR—LIABILITY OF OWNER OF BUILDING.—In **MULCHEY v. METHODIST RELIGIOUS SOCIETY AND OTHERS**, 125 Mass. 487 (October, 1878), defendants' exceptions to verdict for plaintiff were *overruled*, the case being stated in the syllabus to the official report as follows: "In an action of tort against a religious society and against A. and B., its agents, for personal injuries occasioned to the plaintiff by the fall of a staging, upon which he was standing while engaged in painting the ceiling of a church belonging to the society, it appeared that A. and B., acting as a committee and as the author-

ized agents of the society, made a contract with C., in whose employ the plaintiff was, to paint the whole of the inside of the church building for a gross sum, and not subject to the direction or control of the defendants, except as to the quality of the work and the time within which it was to be performed; that the society undertook to erect and remove the staging to be used by C., and, acting through the same agents, employed D., a carpenter and builder of their own selection, by a contract for a gross sum, and not subject to the direction or control of the defendants, to erect and remove the staging and to supply all the material and labor required for that purpose; and that C. did not and could not know, from the appearance or from examination of the staging, whether it was or was not strong enough for his workmen to go upon to paint the church. There was no evidence that the defendants took any part in erecting the staging, or in directing its erection, beyond making the contract with D.; or that they at any time made any inspection of the staging; or that they were guilty of any negligence in employing D. to erect it. *Held*, that the society, through its authorized agents, had accepted and used the staging, and had in effect invited and induced C. and his workmen to come upon it to paint the church, and was liable to the plaintiff for an injury from the dangerous condition of the staging which was not apparent to him and which was caused by negligence in its construction. *Held*, also, that the society and its agents could not be sued jointly in this action." Opinion by GRAY, CH. J.

FALL OF STAGING—COMPLETED OR TEMPORARY STRUCTURE—INSTRUCTIONS.—In **CLARK v. SOULE**, and **WHITE v. SOULE**, 137 Mass. 380 (*June, 1884*), two actions of tort, for personal injuries caused by the fall of a staging, upon which the plaintiffs were at work in the employ of the defendant (the two cases being tried together and verdict being returned for defendant), the exceptions alleged by plaintiffs were *overruled*. The syllabus to the official report states the cases as follows: "In an action by a workman against his employer, for personal injuries caused by the fall of a staging upon which he was at work, it was in dispute whether the defendant undertook to furnish the staging as a completed whole, or whether he undertook merely to provide, and did provide, a quantity of staging materials from which fellow-servants of the workman erected the staging. The judge instructed the jury that a master is liable to his servant for injuries resulting from defective materials negligently furnished by him, although the negligence of a fellow-servant contributes to the accident; and, on the question whether the obligation of the master extended to the furnishing of the staging as a complete structure, read the instructions

requested by each party, and instructed the jury, that, if the plaintiff's theory was correct, the instructions he asked for were law; and that, if the defendant's theory was correct, the instructions he asked for were law. *Held*, that the plaintiff had no ground of exception." Opinion by W. ALLEN, J.

PLANK BREAKING IN TEMPORARY STAGING—ASSUMPTION OF RISK.—In **O'CONNOR v. RICH**, 164 Mass. 560 (*November, 1895*), verdict directed for defendant in the Bristol Superior Court was *sustained*, the case being stated by KNOWLTON, J., as follows: "The plaintiff fell and was injured by reason of the breaking of a plank in a temporary staging on which he was working in the defendant's building. It is not disputed that the staging was of a kind the construction of which is ordinarily left to the servants of the builder, and that the duty of the master concerning it was performed if he furnished a sufficient supply of suitable materials from which to construct it. In this case there was uncontradicted evidence that there were plenty of planks furnished by the defendant from which to build the staging, and the negligence, if there was any, was on the part of the workmen who put the planks in place in taking one which was not adapted to such a use. Upon these facts, if the plaintiff had been in the defendant's service at the time when the staging was built, it would be very clear that he could not maintain his claim. *Kennedy v. Spring*, 160 Mass. 203. But it appears that, although he had previously worked for a considerable time upon the building, he was away working for another person four days before the day of the accident, and this staging was erected a day or two before his last engagement in the defendant's service began. Under these circumstances the question is whether the defendant is liable to him for the previous negligence of a servant in doing work which may properly be intrusted to servants. We are of opinion that an employer under such circumstances owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow-servants for their negligence. If he owes no such duty, the risk of accident from previous negligence of servants in their own field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service. See *Moynihan v. Hills Co.*, 146 Mass. 586, 591, 15 Am. Neg. Cas. 602, *ante*. This point was expressly decided in *Killea v. Faxon*, 125 Mass. 485, 15 Am. Neg. Cas. 607, *ante*, a case very similar to this in its facts. See *Wilson v. Merry*, L. R., 1 H. L. Sc. 326. Exceptions overruled."

EMPLOYEE INJURED BY FALL OF DERRICK—INCOMPETENT SERVANTS—DEFECTIVE APPLIANCE—BURDEN OF PROOF—MASTER NOT LIABLE.—In **DUFFY v. UPTON et al.**, 113 Mass. 544 (*November, 1873*), action by an employee for damages for injuries sustained by the fall of a derrick while at work on a building of defendants, verdict rendered for defendants was sustained, and plaintiff's *exceptions overruled*. COLT, J., in rendering the opinion, said:

"The accident happened in the attempt to raise a stick of timber by the derrick to the top of the building. Several fellow-workmen under the direction of Bancroft, the foreman, were engaged in the operation. It may be assumed for the purpose of this discussion, and as most favorable to the plaintiff, that the plaintiff and the others were in the direct employment of the defendants. They were at the time of the accident in the very same employment. And the plaintiff does not seek to recover for the negligence of his fellow-servants, but insists upon the culpable negligence of the defendants themselves, first, in the employment of unskilful and incompetent servants, and next, in the improper use of an insufficient derrick as an appliance in the prosecution of the work (1).

"Upon a careful review of the evidence, we fail to find anything which would warrant a verdict for the plaintiff on either ground. There is nothing to show that the derrick was not properly made, or that the material used on it was not of sufficient strength for the work to be done. It appears that the timber, while being raised to its place, met with some obstruction in its way, and thereupon the order was given by Bancroft to 'give another hoist and take it up;' then the spar broke and the plaintiff was struck. The breaking was apparently due to the careless attempt to overcome by force an unforeseen obstruction in the work. It is not shown to have been caused by the imperfection of machinery furnished by the master for the servants' use. The burden is on the plaintiff to show negligence, and this is not one of the cases where proof of the accident is *prima facie* evidence of negligence. The accident might have happened without the negligence alleged, and the means of knowledge as to the cause of the injury was clearly within the plaintiff's reach. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 316, 3 Am. Neg. Cas. 760.

"Nor can we find evidence in the case that the defendants did not exercise due care in the selection of suitable agents and servants in the conduct of the business in which the plaintiff was employed.

1. See, also, **SUMMERSELL v. FISH** fall of a derrick, while at work on a building of defendants. Verdict for where plaintiff, a carpenter in defendants was sustained and plaintiff's exceptions overruled.

And upon the whole case there is nothing to take it out of the rule which exempts the master from responsibility to one servant for the negligence of another in the same employment. Exceptions overruled."

Fall of derrick — Fellow-servant.

In *McGINTY v. ATHOL RESERVOIR CO.*, 155 Mass. 183 (January, 1892), tort for personal injuries occasioned to plaintiff while in defendant's employ by the fall of a derrick used by it in constructing a dam, defendant's exceptions on verdict for plaintiff were *sustained*. The second paragraph of the syllabus to the official report states the case as follows: "In an action at common law against a corporation for personal injuries occasioned to an employee by the fall of a derrick used by the defendant in building a dam, it appeared that the derrick was changed from place to place as the work required, and the accident was due to the pulling up of the post to which one of the guy ropes had been fastened, and which was secured by a timber put crosswise in the ground in front of it; that the post was set by another employee under the direction of the defendant's superintendent; and that there was no defect or insufficiency in the derrick, or in the rope or post or cross timber. *Held*, that the superintendent as regards the setting of the post and timber acted as a fellow-servant of the plaintiff; and that the defendant was not liable for his negligence."

Fall of derrick in granite quarry.

In *KILBERG v. BERRY AND ANOTHER*, 166 Mass. 488 (September, 1896), tort, for personal injuries sustained by plaintiff, while in defendants' employ, by the falling of a derrick owned and operated by defendants in their granite quarry, defendants' exceptions to verdict returned for plaintiff were *sustained*, it being held that there was no evidence to justify a finding that defendants knew the derrick to be unsafe, or that they deceitfully ordered plaintiff to work near it.

Carpenter injured by fall of derrick being moved by foreman and laborers — Independent contractor — Negligence not shown.

In *McKINNON v. NORCROSS ET AL.*, 148 Mass. 533 (February, 1889), judgment was rendered on the verdict directed for defendants in the trial court, the case being stated in the syllabus to the official report as follows: "A foreman, employed by a firm of contractors and in charge of a building in process of erection, undertook to move a derrick with the assistance of laborers in their employ, one of whom had worked about derricks more or less for five years; and the derrick, through the breaking of a rope fur-

nished by them, fell and injured a carpenter, who was also employed by them and at work on the building under the foreman's direction. There were at hand, furnished by the contractors, all the tools, materials, and appliances needed to move the derrick safely. *Held*, in an action against the contractors to recover for the injuries, that, in the absence of evidence that the foreman was not a proper person to be intrusted with the work, or that the rope which broke was not strong, there was no negligence shown on the part of the contractors." *Held*, also, that "evidence of a conversation with the foreman after the accident, in which he told how it happened, was rightly excluded."

Fall of derrick — Independent contractor — Owner of building.

In *LINNEHAN v. ROLLINS AND OTHERS*, Trustees, 137 Mass. 123 (*April, 1884*), tort, against the owners in trust of an estate on Washington street, in the city of Boston, for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants, or of their servants or agents, by the fall of a derrick, verdict for plaintiff for \$5,500 was *sustained*. Field, J., delivered the opinion of the court as follows: "Whether an owner of a building retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of a contractor and his employees in the performance of the work, depends upon the construction to be given to the contract. *Erie v. Caulkins*, 85 Pa. St. 247; *R. R. v. Hanning*, 15 Wall. 649; *Eaton v. European & N. A. R'y*, 59 Me. 520; *Cincinnati v. Stone*, 5 Ohio St. 38; *Newton v. Ellis*, 5 El. & Bl. 115; *Blake v. Thirst*, 2 H. & C. 20. In this case, for the reasons given in the instructions, we think the defendants are liable for injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do. *R. R. Co. v. Hanning*, *supra*; *Clapp v. Kemp*, 122 Mass. 481; *Brackett v. Lubke*, 4 Allen, 138; *Brooks v. Somerville*, 106 Mass. 271; *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194. Exceptions overruled."

See *FORSYTH v. HOOPER*, 11 Allen, 419, on question of independent contractor.

See, also, *BRACKETT v. LUBKE*, 4 Allen, 138, where the lessees of a building were held liable to a third party injured by the negligence of a carpenter employed by them to repair an awning over a public way.

Fall of derrick — Independent contractor — Fellow-servant.

In *BURRILL v. EDDY*, 160 Mass. 198 (*November, 1893*), tort for personal injuries occasioned to plaintiff from the fall of a der-

rick belonging to defendant, and being used in the construction of a building, defendant's exceptions on verdict for plaintiff were *overruled*, it being held that "although the servants of different contractors, while engaged in working together on a building, are in a common employment, they are not fellow-servants unless they have a common master." LATHROP, J., ruled that the case was governed by *MORGAN v. SMITH*, 159 Mass. 570, decided since the argument and where a similar ruling was made. (See case next reported.)

EMPLOYEE INJURED WHILE WORKING ON VENTILATOR OF ROOF OF BUILDING—FELLOW-SERVANT—INDEPENDENT CONTRACTOR.—In *MORGAN v. SMITH* and *MORGAN v. SEARS*, 159 Mass. 570 (*October, 1893*), there was evidence that the plaintiff, who was a workman in the employ of Flannagan, a carpenter, was, while in the exercise of due care on his part, injured by the negligent act of McCarthy, a mason in the employ of Smith, the defendant in the first case. Flannagan and Smith were engaged in repairing a building owned by Sears, the defendant in the second case. At the time of the accident the plaintiff and McCarthy were working together in putting in a ventilator on the roof. The justice who tried the case in the Superior Court (Suffolk) ruled, at the close of the evidence, that there was no evidence which would warrant a finding for the plaintiff in either case, and directed a verdict for the defendants; and the case came before the Supreme Court on the plaintiff's bill of exceptions to this ruling. The opinion was rendered by LATHROP, J., who discussed fully, with numerous citations, the points in the case, and the rulings of the learned justice are set out in the syllabus to the official report as follows:

"Although the servants of different contractors, while engaged in working together on a building, are in a common employment, they are not fellow-servants unless they have a common master.

"In an action for personal injuries occasioned to the plaintiff while in the employ of A., a carpenter, by the negligence of B., a mason in the employ of the defendant, it appeared that the accident happened while the plaintiff and B. were working together in putting in a ventilator on the roof of a building which A. and the defendant were engaged in repairing, the work on the ventilator being extra work not covered by the contract for repairing the building. There was evidence that A.'s men did not know whether they were working on extra work or contract work; that they worked interchangeably on the work covered by the contract and the extra work; and there was no evidence that the plaintiff knew that the ventilator was extra work. *Held*, that the jury would have been warranted in finding that the plaintiff did not cease to be a servant

of A., and that he remained under his control or that of his foreman while engaged in doing the extra work.

"In an action for personal injuries occasioned to the plaintiff while in the employ of A., a carpenter, by the negligence of B., a mason in the employ of the defendant, it appeared that the accident happened while the plaintiff and B. were working together in putting in a ventilator on the roof of a building belonging to C., which A. and the defendant were engaged in repairing under contracts with C. There was evidence from the defendant himself that B. was not only employed by him, but was his sub-foreman at the time of the accident; that B. was under his exclusive control and responsible to him alone; that he had an oral contract with C., by the terms of which he was to do all the mason work on the building, charging C. the cost price of materials and labor, charging so many hours' work for the men without stating who the men were, and a commission thereon; that there was no extra work, all the work done by him being done under the agreement mentioned above; and there was nothing to show that B. was not under his control at the time of the accident. He further testified that he took all his orders from C.'s architect, who made some changes from the original plans which were carried out by himself. *Held*, that there was evidence on which the plaintiff was entitled to go to the jury.

"If A. makes an oral contract with B., by the terms of which A. is to do all the mason work on B.'s building, charging B. the cost price of materials and labor and a commission thereon, A. is an independent contractor, and not B.'s servant; and the fact that he takes all his orders from B.'s architect, who makes some changes from the original plans which are carried out by A., does not change the relation between A. and B., or make the servants of A. the servants of B." The exceptions in the first case were sustained, and those in the second case overruled. (J. R. SMITH appeared for plaintiff; J. LOWELL, JR., for defendants.)

ZEIGLER v. DAY.

Supreme Judicial Court, Massachusetts, September, 1877

[Reported in 123 Mass. 152.]

EMPLOYEE INJURED BY CAVE-IN OF SEWER—SUPERINTENDENT—FELLOW-SERVANT.—Where plaintiff was injured by the cave-in of the sides of a sewer in which he was working for defendant who had the contract for its construction, the work being done under the direction of a superintendent, who was admitted to be skilful and competent, such superintendent to receive one-half of the

profits as compensation for his services, and it appeared that the sides of the sewer were not properly braced, but there was no evidence that defendant failed to furnish suitable material, or knew of the cause of the accident, it was *held* that defendant was not liable, and that the superintendent was a fellow-servant of plaintiff (1).

TORT, for personal injuries sustained by plaintiff, by the falling in of the sides of a sewer upon which he was at work while in the employ of the defendant, who was a contractor. Trial in this court [Suffolk], before LORD, J., who reported the case for the determination of the full court on the question whether plaintiff, upon the evidence put in and offered, should become nonsuit, or the case stand for trial. *Plaintiff nonsuit.*

G. S. HALE and W. EMERY, for plaintiff.

T. H. SWEETSER and J. W. HAMMOND, for defendant.

Colt, J.—To maintain this action the plaintiff must show a neglect of some duty on the part of the defendant, which he owed to the plaintiff while he was employed in his service, and which was the sole cause of the injury complained of. The plaintiff alleges that there was such neglect, either in not providing sufficient security against the caving in of a trench while he was digging for the defendant, or in not notifying him of danger connected with the work, of which the defendant was aware, but of which the plaintiff was ignorant. The plaintiff's evidence is made part of the report, and the question is

1. See, also, the following cases relating to cave-in accidents:

In *O'CONNOR v. ROBERTS ET AL.*, 120 Mass. 227 (April, 1876), tort, for personal injuries sustained by plaintiff, a laborer in the employ of the defendants, who were contractors, engaged in digging a trench, caused by the fall of a part of the dirt in the trench, it was held that plaintiff could not recover where the injury resulted from the negligence of the defendant's foreman, the latter being plaintiff's fellow-servant. Defendant's exceptions to verdict returned for plaintiff for \$175, were *sustained*.

In *FLOYD v. SUGDEN*, 134 Mass. 563 (April, 1883), plaintiff's exceptions on verdict returned for defendant were overruled. the syllabus to the official report stating the case as follows:

"If a person employed to dig a trench is injured by the caving in of the sides of the trench, his employer is not liable to an action for such injury, if he furnished the materials for sheathing or shoring up the sides of the trench, and the materials were not used for that purpose by the person employed by him to superintend the digging of the trench." Opinion by W. ALLEN, J.

In *McKEE v. TOURTELLOTTE*, 167 Mass. 69 (October, 1896), tort, for personal injuries sustained by plaintiff, while in defendant's employ, by the caving in of the bank of an unshored ditch in which he was working. verdict for plaintiff was sustained and defendant's exceptions overruled. Opinion by HOLMES, J.

whether that evidence, with "offers to prove an unsafe and defective system of construction," and that the defendant was present from time to time and had knowledge of the way in which the work was progressing, should have been submitted to the jury.

It appeared that the defendant had contracts for the construction of sewers through the streets of the city of Cambridge; that at the time of the accident the plaintiff was at work for him, digging for one of the sewers, through soil more or less sandy, under the direction of one Winning, who had charge of the work as superintendent, and whose skill and competency were admitted by the plaintiff. It did not appear that the defendant did any work himself on the sewer, or that he gave any directions to the men who were at work under Winning. For the safety of the men in the trench, it was necessary, in some dangerous places where the soil was loose, to place planks properly braced to keep the sides from falling in. The necessity for this, as well as the proper mode of applying the safeguards, was from the nature of the case left to be determined by the superintendent as the work of excavating and extending the sewer progressed. There was no evidence that the defendant failed to furnish sufficient and suitable material for the construction of the required safeguard, or that he was chargeable with any special personal neglect, or knew of the cause of this injury. The offer of proof that the system of construction was unsafe and defective, and known to the defendant, in addition to the evidence reported, was an offer not to prove the existence of any fact inconsistent with or additional to those already in evidence, but to show that the general mode adopted was known to the defendant, and that he was therefore responsible for it.

If the negligence relied on to support the action was the negligence of a fellow-servant while engaged in the same general business, or in a service which constituted part of the common employment, although it was a service of a higher grade, the plaintiff can not recover. Such negligence is regarded as among the ordinary risks of the employment in which he was engaged. On the other hand, the master is bound to exercise ordinary care in the choice of servants and in supplying suitable appliances, instrumentalities or materials, for the performance of the work required. If the plaintiff suffered from the master's neglect in this respect he may recover.

We are of opinion that the evidence would not warrant a jury in charging the defendant with neglect of the latter description. The master does not insure the safety of the servant. He is only required to use reasonable care to provide suitable material and appliances, so that the workman may be only exposed to such risks as are ordinarily incident to the business. It is not always easy to decide whether a given injury was within the risks assumed, or was caused by the master's neglect of duty. "Whether a particular structure or appliance is one for which the master is responsible to his servant may depend upon circumstances, including the nature and scope of the employment of those engaged in its preparation and use. It may depend upon the question whether the direction and charge of the work is confided to the workmen or some of them, or retained by the employer or left unprovided for." *Arkerson v. Dennison*, 117 Mass. 407, 15 Am. Neg. Cas. 611, *ante*.

In the case at bar, the work was committed to the supervision of a skilful and competent superintendent; it required, for the protection of the men, the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in case of the scaffold of the mason or the carpenter, the master is not liable unless there is something to show that he assumed it as a duty independent of the servant's employment. The occasional presence of the defendant as the work went on is not enough to charge him with this duty. *Summersell v. Fish*, 117 Mass. 312; *Johnson v. Boston*, 118 Mass. 114; *Hodgkins v. Eastern R. R.*, 119 Mass. 419; *O'Connor v. Roberts*, 120 Mass. 227; *Kelley v. Norcross*, 121 Mass. 508; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400 (1).

But the plaintiff contends that the case is taken out of these rules by the fact that the superintendent, Winning, was a partner or joint principal with the defendant in this work, and not a fellow-servant of the plaintiff. The undisputed facts, however, show that he was not a partner. The agreement was that Winning should work for the defendant as superintendent and should receive one-half the profits as compensation for his work; he was to furnish no capital; he was to share no losses

1. The cases cited are reported with the Massachusetts case in this volume of AM. NEG. CAS.

and to be responsible for no debts; he had no lien, no interest in the stock or materials or in the profits as profits. The parties did not understand that they were partners. *Ryder v. Wilcox*, 103 Mass. 24; *Denny v. Cabot*, 6 Met. 82. The facts disclosed do not change Winning's relation to the plaintiff as his fellow-servant. In view of the plaintiff's express admission as to his skill and competency, we have not considered whether his peculiar relation to the principal was such as to disqualify him, or to charge the defendant with neglecting his duty to the plaintiff by employing him as superintendent upon such terms.

Plaintiff nonsuit.

KALLECK V. DEERING ET AL.

Supreme Judicial Court, Massachusetts, June, 1894

[Reported in 161 Mass. 469.]

DEFECTIVE APPLIANCE ON BOARD SHIP—MATE IN COMMAND—FELLOW-SERVANT—ASSUMPTION OF RISK—COMMON-LAW RULE.—In an action to recover damages for injuries sustained by plaintiff while on board one of defendants' vessels in the harbor, caused by the breaking of a triangle on which plaintiff was sitting and scraping a mast, the mate being in control of the vessel at the time, and giving orders to plaintiff to use the triangle, verdict for plaintiff was set aside, the common-law rule as to fellow-servants and assumption of risk being applied.

MATE AND SEAMAN—FELLOW-SERVANTS.—The mate of a vessel, in temporary command of the same, and a seaman working under him, are fellow-servants, and the seaman takes the risk of the negligent command of the said mate.

ADMIRALTY AND COMMON LAW.—The fact that the accident happened on board ship is not a sufficient reason for departing from the application of the common law in such case.

DAMAGES—ADMIRALTY AND COMMON-LAW RULE.—The admiralty rule of division of damages where a plaintiff has been guilty of contributory negligence cannot be followed in an action at common law.

TORT, against the owners of a vessel for personal injuries occasioned to the plaintiff while on board the vessel in harbor through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. At the trial in the Suffolk Superior Court, before Fessenden, J., the jury returned a verdict for plaintiff, and the judge, at the request of the parties,

reported the case for the determination of this court. The case is stated in the opinion. *Verdict set aside.*

C. T. RUSSELL, JR., for defendants.

J. M. BROWNE, for plaintiff.

Holmes, J.—This is an action of tort for personal injuries suffered on board a coasting vessel while in harbor, through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. As the case comes before us, we must take it that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate.

By the common law, as understood in this State, the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and, therefore, if those engaged upon it were fellow-servants in their general standing and occupation, the plaintiff took the risk of their negligence. They were not removed from the class of fellow-servants for the time being by the nature of their occupation, to adopt the mode of expression which has been used. *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 15 Am. Neg. Cas. 534, *ante*; *Monihan v. Hills Co.*, 146 Mass. 586, 15 Am. Neg. Cas. 602, *ante*; *Allen v. G. W. & F. Smith Iron Co.*, 160 Mass. 557, 15 Am. Neg. Cas. 577, *ante*. But if the work had been done by the defendants in person, and they had done it negligently, they would have been liable, and it is argued that they are equally liable when the work is done by the master of the vessel, or by one who for the time being stands in his place. It is said that the master is not a fellow-servant with the seamen, and, therefore, is not within the rule as to the risks assumed by the plaintiff, but that he is nevertheless an agent and representative of the owners, and that his negligence is their negligence. Even if it be said, as it has been said in some cases, that masters are not liable to servants for the negligence of others except when the law on grounds of policy imposes a personal duty on them to see certain precautions taken or reasonable care used; and if it be admitted, therefore, that the defendants could not be liable for negligence in the construction of the triangle on the part of the master,

whether a servant or not, any more than when the same work was done by the seamen (*Quinn v. N. J. Lighterage Co.*, 23 Fed. 363; *The Queen*, 40 Fed. 694, 696; *Loughlin v. State*, 105 N. Y. 159, 162; *B. & O. R. R. v. Baugh*, 149 U. S. 368, 385); still, ordering the plaintiff to use the faulty triangle was an act belonging to the superior officer as such, and it might be that as to that a different rule would apply.

Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion can not prevail. If the sailor takes the risk of a negligent injury to his person from a fellow-sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee. See *Flynn v. Campbell*, 160 Mass. 128, 130, 15 Am. Neg. Cas. 654, *ante*. If the defendants have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact, the question whether the negligence of one of those persons is within or outside of the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases. *Moody v. Hamilton M'fg Co.*, 159 Mass. 70 [reported in this volume, *post*]. The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and, therefore, when the duty is not personal to the employer the same rule applies, whatever the degree of the negligent employee. *Balt. & O. R. Co. v. Baugh*, 149 U. S. 368, 384. These considerations apply, and have been applied by common-law courts, to the captain of a vessel, and it has been said that he is a fellow-servant within the meaning of the rule. *Hedley v. Pinkney & Sons S. S. Co.* [1892], 1 Q. B. 58; *Loughlin v. State*, 105 N. Y. 159. So in this Commonwealth as to a mate. *Benson v. Goodwin*, 147 Mass. 237 (1). Without considering what may be the best mode of expressing it, we agree with the result of those cases.

1. In *BENSON v. GOODWIN ET AL.*, were part owners of a vessel, an appliance falling on plaintiff's foot while attending to same under orders of the mate, defendant's exceptions to ver-

But it is argued that a different doctrine obtains in the admiralty, and that we ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen. For this argument it does not matter precisely where the vessel was. If the accident happened within the body of the county the admiralty jurisdiction would not be excluded. *Waring v. Clarke*, 5 How. 441; *The Commerce*, 1 Black, 574; and if upon the high seas, that of the common law is not to be denied. *Percival v. Hickey*, 18 Johns. 257; *Wilson v. Mackenzie*, 7 Hill (N. Y.), 95, 97.

The case most relied on is *The A. Heaton*, 43 Fed. Rep. 592, followed by *The Frank & Willie*, 45 Fed. Rep. 494, and *The Julia Fowler*, 49 Fed. Rep. 277. Compare *Morse v. Slue*, 1 Vent. 238; s. c., 3 Keb. 135; 1 *Molloy de Jure Marit.*, book 2, c. 2, § 2. If the American cases meant that the admiralty courts had worked out the liability of the ship for the acts of the captain for their own peculiar principles, it might be necessary to inquire whether the personal liability of the owner necessarily followed from the same premises, and if it did, why the common law should yield to the admiralty rather than the admiralty to the common law. But it hardly is to be expected that different views of the substantive law should be enforced by the same judges sitting in different courts. In *The A. Heaton*, Mr. Justice Gray did not declare a doctrine peculiar to the admiralty, he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with the cases in this Commonwealth, and which has been explained by a later decision of the court which rendered it. *Chicago, M. & St. P. R'y v. Ross*, 112 U. S. 377. See *Balt. & Ohio R. R. v. Baugh*, 149 U. S. 368 (1). Under these circumstances the Circuit Court cases do not seem to us a suf-

dict returned for plaintiff were sustained, the Supreme Court holding that "the plaintiff and the mate were employed by the same master in a common service * * * and * * * were fellow-servants.

1. In *Chicago, Mil. & St. P. R'y Co. v. Ross*, 112 U. S., 377, it was held (four justices dissenting) that a railroad company was liable for injury to an engineer of a train resulting from the negligence of the conductor in failing to deliver to the engineer a

telegram ordering the train sidetracked to allow another train to pass and a collision followed.

But see *New England R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182 (1899), where the decision in that case does away with the vagueness and uncertainty heretofore existing in the Federal rule of fellow-servants because of the decisions in the *Ross* and subsequent cases decided on the authority of the *Ross* case, referred to in the *Conroy* case.

ficient reason for departing from the common law because the accident happened on board ship. Moreover, it is very plain that we can not adopt the admiralty rule as a whole. We can not divide the damages when the plaintiff has been guilty of contributory negligence, as was done in *The Julia Fowler*, 49 Fed. Rep. 277; *The Max Morris*, 137 U. S. 1. See *Dowell v. General Steam Nav. Co.*, 5 El. & Bl. 195, 206.

Verdict set aside.

Employee struck by swinging spile on barge.

In *LANG v. TERRY*, 163 Mass. 138 (*February, 1895*), tort, for personal injuries received by plaintiff, while in defendant's employ, from the blow of a swinging spile, defendant's exceptions on verdict returned for plaintiff were overruled, the opinion being rendered by KNOWLTON, J., as follows: "The principal exception saved in this case was to the refusal of the presiding justice to rule that there was no evidence of due care on the part of the plaintiff. At the time of the accident, the plaintiff was engaged in the performance of his duty, putting some boards over an iron casting on the deck near the bow of the boat, in accordance with the direction of the captain. He was struck by a swinging spile which was hoisted by a derrick and steam hoisting engine for the purpose of being transferred from the steam barge to the barge on which he was working. The spile was hoisted and swung around without the use of a guide rope. It appears that he could have seen the spile before it struck him if he had been looking for it, and he testified that he knew they were going to lift the timber when they got ready and everybody was out of the way; but he did not suppose they were ready to start when they did. There was evidence that a warning was given him to look out just as he was struck, but not in time to enable him to avoid the swinging timber. One witness testified that the hoisting, after the chain was fastened to the spile, occupied only about a second. We are of opinion that it was a question of fact for the jury on the evidence, whether the plaintiff had such reason to expect the hoisting of the spile without warning, and the swinging of the spile in a dangerous way, as to require him in the exercise of ordinary care to watch the operation of the hoisting engine, and look out for himself. They might think that he had reason to expect that the spile would not be hoisted while he was at work over the grating without first giving him warning, or that it would not swing in such a way as to strike him. It cannot be said, as matter of law, that in the performance of his duty under orders from the captain he was obliged to anticipate such a danger, or to rely solely on his own watchfulness to guard against an injury

which could only come from the negligence of others. *Magee v. West End St. R'y*, 151 Mass. 240, 12 Am. Neg. Cas. 58*n*; *Davis v. N. Y., N. H. & H. R. R.*, 159 Mass. 532, 12 Am. Neg. Cas. 80*n*. See, also, *Thyng v. Fitchburg R. R.*, 156 Mass. 13, 15 Am. Neg. Cas. 458, *ante*; *Maher v. Boston & Albany R. R.*, 158 Mass. 36, 15 Am. Neg. Cas. 459, *ante*; *Lynch v. Allyn*, 160 Mass. 248, 15 Am. Neg. Cas. 576, *ante*. The questions to the expert, and his answers, were rightly admitted in evidence. There was nothing to show that there was any dispute in regard to the way in which the derrick was equipped, or that the answers of the witness involved any matter of opinion except upon subjects about which he could probably testify as an expert. *Prendible v. Conn. River M'f'g Co.*, 160 Mass. 131, 15 Am. Neg. Cas. 596, *ante*; *Poole v. Deane*, 152 Mass. 587. Exceptions overruled." (J. W. CUMMINGS appeared for plaintiff; R. W. NASON, for defendant.)

Employee loading vessel struck by bale of cotton.

In *CLARK v. MERCHANTS & MINERS TRANSPORTATION CO.*, 151 Mass. 352 (*April, 1890*), plaintiff's exceptions to direction of verdict for defendant in the Superior Court were sustained. At the trial "the plaintiff offered to prove that on June 14, 1888, he was employed by the defendant to assist in loading one of its vessels then lying at its wharf in Boston, under the direction of one Haley employed by the defendant as head stevedore to take charge of the loading and unloading of its vessels at such wharf; that Haley directed the plaintiff to go down into the hold of the vessel to stow away bales of gunny-cloth which should be thrown down from the deck above, a distance of twenty-five or thirty feet; that it was the custom there to load gunny-cloth into a vessel by throwing down a number of bales while the men below stopped working, which bales were stowed away before a further lot was thrown down; that while the plaintiff was engaged in stowing away the bales thrown down, other bales were thrown down from the deck at the same time, whereupon the plaintiff called out to those on deck to stop throwing the bales down until he had finished stowing away; and that Haley, notwithstanding, directed other bales to be thrown down while the plaintiff was then at work, which bounded and struck the plaintiff, and caused the injuries in question. There was evidence tending to show that the plaintiff was in the exercise of due care. The plaintiff further offered to prove that Haley was incompetent, and unfit to perform the duties of head stevedore and of directing such work; and that the defendant knew of his incompetency and unfitness. The judge ruled that the action could not be maintained, and directed a verdict for defendant," to which plaintiff alleged exceptions. The Supreme

Court (per HOLMES, J.) said: "Ryalls *v.* Mechanics Mills, 150 Mass. 190, 15 Am. Neg. Cas. 552, *ante*, has established that the statute of 1887, c. 270, is not a bar to a recovery at common law in this action. We do not understand it to be disputed that there might be a liability at common law on the facts offered to be proved. As the case may be tried, and as it was not argued for the defendant, we refrain from discussing the different possible aspects of the evidence. Exceptions sustained." (W. B. ORCUTT and E. L. BUFFINGTON appeared for plaintiff; R. STONE, for defendant.)

Falling through hole in flooring of vessel.

In COUGHLIN *v.* BOSTON TOWBOAT CO., 151 Mass. 92 (February, 1890), the ruling of the Superior Court sustaining demurrer to the second count of the declaration was overruled. The second count was as follows: "And the plaintiff says that heretofore, to wit, on the 8th day of November, A. D. 1888, the defendant was the owner of, and had the management and control of, a certain vessel, to wit, a boat or barge named and called the Mabel Stoddard; that said vessel was then lying at a certain wharf in said Boston, to wit, at the wharf of or used by the Bay State Gas Company, so-called; that the plaintiff was then and there at work on said vessel; to wit, as a laborer, to shovel, and shoveling coal in the hold or holds of said vessel, and at discharging the cargo of coal from said vessel to said wharf; that the plaintiff was then and there in the employ of one White, a stevedore then doing the work of discharging the said cargo of said vessel; that the plaintiff while so employed and at work on said vessel, and in the exercise of due, ordinary and reasonable care, fell through and into a certain dangerous hole or opening in the floor or flooring of said vessel;" that said hole or opening existed through the negligence of the defendant; and that the plaintiff, who was in the exercise of due care, and supposed that such floor or flooring was safe and suitable to work upon, and who had received no notice and had no knowledge of its unsafe and dangerous condition, as a result of such fall received severe personal injuries, to his great damage. The Supreme Court (per HOLMES, J.) said: "The second count of the declaration alleges that the defendant was 'the owner of, and had the management and control of, a certain vessel,' on a certain day; that the plaintiff 'was then and there at work on said vessel * * * as a laborer, * * * shoveling coal, and discharging the cargo,' etc.; and that he 'was then and there in the employ of one White, a stevedore then doing the work of discharging the said cargo of said vessel.' We are of opinion that, upon a general demurrer not pointing out any specific defect, the foregoing allegations must be taken to mean that White was doing the defendant's work, and dis-

charging the cargo in the course of business, and that he and the plaintiff were lawfully there in pursuance of an arrangement of some kind between the defendant and White. The language quoted, taken in its natural meaning, is not equally consistent with White's being a trespasser, or with the possibility that he and the plaintiff were engaged in stealing coal. We do not construe declarations quite so adversely nowadays as indictments were construed a hundred years ago. The defendant does not deny that, if the declaration is read as we read it, it discloses a duty to the plaintiff. If a stevedore is employed to discharge a cargo, the laborers whom he employs are within the scope of the invitation to come upon the vessel, irrespectively of the relation of master and servant, or of privity of contract. *Stewart v. Harvard College*, 12 Allen, 58. It is now settled that the statute of 1887, c. 170, does not take away the common-law right of action. *Ryalls v. Mechanics Mills*, 150 Mass. 190, 15 Am. Neg. Cas. 552, *ante*. Demurrer overruled." (J. F. PICKERING and J. W. PICKERING appeared for plaintiff; L. S. DABNEY, for defendant.)

Fire on steamship — Employee suffocated — Liability of steamship owners.

In *PIERCE, ADM'X v. CUNARD STEAMSHIP CO.*, 153 Mass. 87 (*January, 1891*), plaintiff's exceptions to verdict directed for defendant were sustained, the syllabus to the official report stating the case as follows: "In an action for personal injuries to the plaintiff's intestate, which ended in his being stifled by the smoke from a fire in the defendant's steamship, there was evidence that he was at work with others in a compartment between decks when the fire broke out there; that he delayed a little in trying to escape, seemingly to get something; that the other men ran up a movable ladder through a hatchway to the main deck; that as the last two or three men came up, the hatchway was nearly covered, and soon after was completely covered, by a tarpaulin, in obedience to an order to cover the hatches; that one of the men standing near to the officer who gave the order said: 'No, there is a man there;' and again: 'It is a shame to cover the hatches and stifle the man;' that the officer replied: 'I don't care a damn; cover the hatches;' that a fireman some time after the hatches were closed heard knocking in the compartment; and that, after the fire was put out, the intestate was found dead near the hatchway, with his coat wrapped about his head. *Held*, that the jury would be justified in returning a verdict against the defendant." Opinion by HOLMES, J.

**NOTES OF MASSACHUSETTS CASES RELATING TO INJURIES TO
EMPLOYEES ON STEAM AND OTHER VESSELS, CAUSED BY
DEFECTIVE APPLIANCES, FALLING OBJECTS, HATCHWAYS,
ETC.**

Minor employee, a cook on steam tug, injured by appliance.

In *WILLIAMS v. CHURCHILL*, 137 Mass. 243 (May, 1884), the case is stated in the syllabus to the official report as follows: "The cook of a steam tug, nineteen years old, who has lived on the seashore all his life, has been to sea three summers, and has been employed on the tug four months, the length of time which it took his predecessor to become familiar with the duties on board, cannot maintain an action against the owner of the tug, who was also its master, for personal injuries caused, in broad daylight, by his getting entangled in the loose end of a line which he was engaged in making fast to a cleat toward the bow of the boat, the bow line being more dangerous to handle than the stern-line, because the strain upon it is greater, and it being usual to employ him at the stern, although a part of his duty was to work on deck generally; and the fact that the master urged him forward by saying, with an oath, 'you won't get that rope fast,' will not enhance the liability of the defendant." Verdict for defendant sustained. Opinion by HOLMES, J.

Employee delivering coal injured by breaking of mast of vessel at wharf.

In *HAYES v. PHILADELPHIA AND READING COAL & IRON CO.*, 150 Mass. 457 (January, 1890), judgment was rendered on verdict for plaintiff, the syllabus to the official report stating the case as follows: "In an action to recover for personal injuries occasioned to the plaintiff through the alleged negligence of the defendant, there was evidence that the defendant, a coal company, had agreed to deliver a cargo of coal alongside a customer's wharf; that according to the course of dealing between them the coal was sent in a barge fitted up with masts, stays, and other appliances peculiarly adapted for the unloading of coal at that wharf, and admitted by the defendant to be for that purpose; that the customer proceeded as usual to use such appliances in discharging the coal, being himself supplied with and furnishing only the supplementary tackle; and that the plaintiff, while employed by the customer to assist in so doing, was injured by the breaking of one of the masts by reason of an improperly secured stay. *Held*, that while a finding would be warranted that it was a part of the contract between the defendant and the customer that the coal should be delivered at the wharf in a barge provided with masts, stays, and other appliances for use by the customer in unloading it, it was enough to entitle the plaintiff to recover if the appliances were actually intended by the defendant to be used by its customers for that purpose, and if the plaintiff's employer as such a customer was invited to use them."

Defective appliance on fishing schooner.

In *ANDERSON v. CLARK*, 155 Mass. 368 (January, 1892), tort, for personal injuries sustained by plaintiff, a seaman on a fishing schooner owned by defendant, caused by alleged defective appliance, plaintiff's exceptions to

verdict returned for defendant were overruled, it being held that the danger was obvious and one of the risks of employment. LATHROP, J., stated the facts as follows: "While the vessel was at anchor in a heavy sea, it became necessary to pay out the cable, and while this was being done the cable slipped between the end of the windlass and the windlass bits, and became fast. To ease the strain on the cable, the master took a rope called the foreboom guy, which had an iron hook on one end, made a hitch with one end of the rope around the cable about twelve feet from the windlass, and passed the other end under and around the windlass head. Thereupon the iron hook straightened out, struck the plaintiff in his face, and severely injured him. The cable was eight and a half inches in circumference, and the rope was about three inches in circumference." * * *

Stevedore injured by defective appliance.

In MCGIVERN, ADM'X, v. THOMAS WILSON'S SONS & CO., ET AL., 160 Mass. 370 (January, 1894), tort, by the administratrix of the estate of George McGivern, for personal injuries occasioned to her intestate, while employed by stevedores upon a steamship owned by defendants, a defective appliance being the alleged cause of injury, verdict for plaintiff was sustained and defendants' exceptions overruled.

Employee loading vessel struck by bale of cotton.

In HICKEY v. MERCHANTS AND MINERS TRANSPORTATION CO., 152 Mass. 39 (June, 1890), tort, for personal injuries sustained by plaintiff by the fall upon him of a bale of cotton caused by the negligence of defendant's servant, plaintiff's exceptions on verdict directed for defendant were sustained, the syllabus to the official report stating the case as follows. "In an action for personal injuries against a steamship company which had undertaken to load a lighter alongside its wharf with cotton, there was evidence that its employees in wheeling the bales on board the lighter were to act under the direction of its stevedore, but in throwing them through a hatch into the hold under that of an officer of the lighter; and that such an employee wheeled a bale upon the lighter, and, without receiving or waiting for any orders from such officer, threw it into the hold and injured the plaintiff. Held, that there was evidence that the employee in throwing the bale of cotton acted as the defendant's servant, and that the defendant was liable for his negligence." Opinion by FIELD, J.

Falling into hatchway of vessel—Negligence of fellow-servant.

In MELLEN v. THOMAS WILSON'S SONS AND COMPANY (LIMITED), 159 Mass. 88 (May, 1893), judgment was rendered on verdict for defendant, the syllabus to the official report stating the case as follows: "The plaintiff, who was employed on a steamer as a coal trimmer, having finished his work at midnight, went forward to his berth. The vessel lurched, he stumbled and fell headlong upon the forward part of the hatch, got up, groped, made a step and fell into the hatchway, and was injured. The deck was lighted by electric lights, which had gone out through causes which the engineer could have obviated. There were lanterns available, and the fact that one of them was not used was due to the omission of a fellow-servant. Held, in an action for damages, that, while the plaintiff was not negligent before his

first fall, he could not recover, as the negligence, if any, was of fellow-servants, and he had failed to show that his injury was caused by inadequate equipment of the vessel, or by any breach of duty on the part of the defendant company." Opinion by HOLMES, J.

Falling into hole in deck of steam tug.

In *WATTS v. BOSTON TOW-BOAT CO.*, 161 Mass. 378 (May, 1894) tort, for injuries received by plaintiff, while in the employ of defendant, by falling into a hole in the deck of a steam tug owned by defendant, verdict directed for defendant was sustained, and plaintiff's exceptions overruled, it being held that plaintiff was wanting in due care. Opinion by FIELD, CH. J.

Employee loading ice on vessel falling through hatchway.

In *PERKINS v. FURNESS, WITHEY & CO.*, 167 Mass. 403 (November, 1896), tort, for personal injuries sustained by plaintiff, while employed by the Independent Ice Company in loading ice on a vessel owned by the defendant corporation, by falling through a hatchway which had been left insecure, owing to alleged negligence of defendant and its servants, verdict for plaintiff was sustained and defendant's exceptions overruled. The decision is thus stated in the syllabus to the official report: "In an action against the owner of a vessel for personal injuries occasioned to the plaintiff, while employed by a contractor in loading ice thereon, by falling through a hatchway which had been left insecure, if there is evidence which warrants the inference that the insecurity of the hatchway was owing to the negligence of the defendant's servants, and evidence of due care on the part of the plaintiff, the case is properly submitted to the jury." Opinion by MORTON, J.

EMPLOYEE INJURED WHILE DESCENDING MINING SHAFT—DANGEROUS MACHINERY—DEFECTIVE BRAKE TO HOISTING BUCKET—FALL OF BUCKET—EVIDENCE—LIABILITY OF MINE OWNERS.—In **MYERS v. HUDSON IRON CO.**, **FLYNN v. HUDSON IRON CO.**, **KANE v. HUDSON IRON CO.**, and **FALLON v. HUDSON IRON CO.**, 150 Mass. 125 (November, 1889), four actions of tort for personal injuries sustained by the plaintiffs, while in the employ of the defendant corporation, by falling down a mining shaft by reason of defective machinery, verdict returned for plaintiff in each case was sustained and defendant's *exceptions overruled*. The Supreme Court (per C. ALLEN, J.) said:

"The several plaintiffs, who were underground laborers in the defendant's mine, were undertaking to descend into the mine through a perpendicular shaft by means of a bucket, as they had been in the habit of doing. The bucket was supported by a wire rope or cable, which wound around a drum, and it was usually controlled in its descent by means of a shoe-brake which pressed upon the rim of the drum. This shoe-brake was operated by the defendant's assistant engineer, by means of a lever. On the occasion of

the accident, the plaintiffs had all entered the bucket, and, upon word being given, the assistant engineer started to let down the bucket, and after it had descended a few feet he found the brake was not holding, and the bucket fell rapidly for about one hundred and twenty-five feet, when it was suddenly stopped by landing-planks across the shaft, and the plaintiffs were hurt. At the trial, much evidence was introduced by the plaintiffs and by the defendant, at the conclusion of all of which the defendant requested the court to instruct the jury to return verdicts in its favor; but the court declined to do so, and submitted the cases to the jury, who returned verdicts for the several plaintiffs. There was no request for any special instruction as to the rules of law applicable to the cases, and no exception was taken to the instructions which were actually given to the jury; but the defendant's complaint is, that the whole evidence was insufficient to warrant the verdicts for the plaintiffs." * * *

The court reviewed the evidence at length, and discussed the duty of the master as to keeping machinery and appliances in good order.

The syllabus to the official report, after setting out the facts, stated the points as follows: "There was evidence that the brake, besides a loss of initial efficiency, was in design and original construction insufficient; that there were safer contrivances for controlling such a descent, some of which the defendant used elsewhere about the mine; and that gearing used in hoisting had, through wear and a change made in it by the defendant, become less useful as a possible means of stopping the bucket if the brake failed to hold; and in fact proved ineffectual to stop the bucket at the time; also that no person had previously been hurt in going down in the bucket. *Held*, that the cases were properly submitted to the jury, who were warranted in finding verdicts for the plaintiffs.

"At the trial evidence was admitted that there were other appliances for lowering a bucket than that used by the defendant which would have been safer; that slips on other occasions had been brought to the knowledge of the defendant's superintendent of the bucket while it was in use in hoisting ores, and, upon the question whether the holding quality of the leather forming the friction surface of the brake had become impaired from the effect of steam upon it, that there was machinery at the foot of the shaft operated by steam and its use, from which steam escaped into the engine-building. *Held*, that the evidence was properly admitted."

DEFECT IN STATIONARY ENGINE—FIREMAN INJURED—QUESTION FOR JURY.—In **CONNORS v. DURITE MANUFACTURING CO.**, 156 Mass. 163 (*March, 1892*), fireman on a stationary engine injured by alleged defect in the engine, the

Supreme Court (per LATHROP, J.) states the case as follows: "The question in this case is whether the court erred in ruling that upon the evidence the plaintiff was not entitled to recover, and in ordering a verdict for the defendant. There was evidence which would have justified the jury in finding that it was the duty of the plaintiff, who was a fireman on a stationary engine, to wipe certain parts of the engine when it was at rest; that after the engine had been stopped by the engineer, and was at rest, he began to wipe it; that the engine at once started up, without any one letting on steam, and his hand was caught and injured; and that the starting up was caused by a leak in the throttle-valve.

"The question is then presented whether there was any evidence of the defendant's negligence. The engine was a second-hand engine when the defendant bought it, about two months before the accident, and had been in use twelve or thirteen years. It had been partially overhauled by the seller before it was set up in the defendant's factory; and a few weeks after it was set up some repairs were made upon it by an employee of the seller, at the request of the defendant. This employee, however, did nothing to the throttle-valve, and did not examine it to see if it leaked, although he testified that he noticed that the cut-off valve had a tendency to hang, and not to shut as intended, and that this defect in combination with a leaky throttle-valve would make it possible for the engine to start after it was at rest. There was also evidence that the wear and tear which would produce the condition of things which caused the defendant to send for the employee of the seller of the engine would tend to cause a leaking throttle-valve. Down to the time of the accident no inspection was made of the throttle-valve, although this could readily have been done.

"It is the duty of a master to provide and maintain reasonably safe and suitable machinery; and while a master may delegate to competent servants the making of ordinary repairs such as a machine requires from day to day, yet as to other repairs the master cannot escape responsibility by merely showing that he has employed intelligent and competent servants, and has furnished them with suitable materials; but he must exercise a reasonable care and supervision over them, and see that they do their duty." * * *

"The fact, therefore, that the engine had some weeks before been overhauled and repaired does not necessarily exempt the defendant from liability." * * *

The court held that plaintiff was entitled to go to the jury, and the verdict for defendant was set aside and case ordered to stand for trial.

Laborer injured while moving heavy steps — Fellow-servant.

In *DUNLAP v. BARNEY MANUFACTURING CO.*, 148 Mass. 51 (*November, 1888*), tort for personal injuries sustained by plaintiff, a general laborer in defendant's mill yard, plaintiff's exceptions on verdict directed for defendant were overruled, MORTON, CH. J., stating the case as follows: "The plaintiff was injured while attempting to move some heavy steps from one part of the defendant's premises to another. He and two other men, who were fellow-servants with him in the employ of the defendant, undertook to lift the steps on to a low truck; they were too heavy to be handled by three men, and the plaintiff's ground of action is that the defendant failed to furnish a proper number of men, or suitable tools and implements, to perform the work. But there is no evidence of any such negligence on the part of the defendant. There is no evidence put in by the plaintiff to show that there was not a sufficient number of men about the premises who could have been called to aid in the work, or that there were not proper tools and implements which might have been used if needed. The evidence for the defendant, which was uncontradicted, showed that there were nine or ten men who might have been called to assist, and all tools and implements necessary to move great weights. The case proved is, that, the defendant having ordered that the steps should be moved, three men who were fellow-servants undertook to do it. If there was any danger in the work, it was obvious to the plaintiff and his fellow-servants. If there was any negligence, it was the negligence of the plaintiff or of his fellow-servants in not calling more men to assist, or in not making use of the tools and implements furnished by the defendant for such cases. The court properly directed a verdict for the defendant. We may add, that the statute of 1887, c. 270, is not applicable, as the accident happened before it went into effect. Exceptions overruled."

Employee injured moving bale of cotton — Defect — Inspection.

In *GARRAGAN v. FALL RIVER IRON WORKS CO.*, 158 Mass. 596 (*April, 1893*), tort, for personal injuries sustained by plaintiff while in defendant's employ, caused by a fall received while moving a bale of cotton by means of an iron cotton hook, verdict returned for defendant was sustained. ALLEN, J., rendered the following opinion: "The plaintiff's ground of complaint is that the bagging gave way while he was attempting to move the bale of cotton, so that he fell and was hurt. In order to hold the defendant responsible for this accident, the plaintiff must show that it was the defendant's duty to provide for an inspection of the bagging upon the bales of cotton which it bought, in order to ascertain its strength and make the handling of the cotton safer. No evidence was intro-

duced to show any custom or agreement to make such inspection, and no such duty was cast upon the defendant by law. A purchaser of cotton in bales is not bound to have the bagging inspected, with a view to ascertain if it is strong enough to hold if iron hooks are caught into the bagging for the purpose of aiding in moving the bales. The performance of such a duty would be impracticable, and no case is cited which holds that such duty exists. It is unnecessary to consider the plaintiff's other exceptions. Exceptions overruled."

FITZGERALD V. CONNECTICUT RIVER PAPER CO.

Supreme Judicial Court, Massachusetts, December, 1891.

[Reported in 155 Mass. 155.]

DANGEROUS PASSAGEWAY — EMPLOYEE INJURED BY SLIPPING ON ICY STEPS ON STAIRWAY — QUESTIONS FOR JURY.— Where it appeared that an employee, a woman fifty-one years of age, had been working in defendant's mill for several years, was employed in the rag-room all the time, that there was a stairway of seven steps outside the building leading from the ground to a platform which led to the door of the rag-room, being the only stairway provided for entering and leaving said room; that the spray from a steam exhaust pipe in a building opposite the stairway frequently fell upon said stairway and froze, making the steps slippery; that the employee knew the condition of the steps; and that while leaving work one March evening she slipped on one of the icy steps and fell and was injured. *Held*, that there was sufficient evidence for the jury on the question of defendant's negligence in permitting the steps to be slippery and dangerous. *Held*, also, that it was a question for the jury whether the plaintiff exercised due care on the occasion of the accident, and it was error for the trial judge to direct verdict for defendant.

CONTRIBUTORY NEGLIGENCE.— The fact that plaintiff knew of the icy condition of the steps of the stairway does not, as matter of law, show that she was negligent in trying to descend them, holding by the rail, — especially if she had no other way of getting from the mill.

ASSUMPTION OF RISK — VOLENTI NON FIT INJURIA. — The question whether plaintiff assumed the risk, and the application of the doctrine, *volenti non fit injuria*, fully discussed in the opinion by KNOWLTON, J. (1).

1. See, also, *MAHONEY v. DORE*, 155 Mass. 513 (February, 1892), where defendant's domestic servant was injured by falling on a flight of stairs leading from the kitchen into the back

yard of defendant's boarding house, in which KNOWLTON, J., discusses the doctrine of *volenti non fit injuria*.

As to the question of due care on plaintiff's part the court said: "There

TORT, for personal injuries occasioned to the plaintiff while employed by the defendant in its paper-mill, through an alleged defect in a stairway leading to and from the mill. Trial in the Superior Court, before Mason, Ch. J., who allowed a bill of exceptions, which, so far as material, was as follows:

"The evidence introduced by the plaintiff tended to prove that the plaintiff, a woman fifty-one years of age, had been working in the mill of the defendant thirteen years, though not all the time for the same company; that she worked in the rag-room all the time; that there was a stairway of seven steps

was evidence for the jury on the question whether the plaintiff was in the exercise of due care in trying to go down the stairs. She had occasion to go there, and although it was dark and she knew there was snow and ice on the steps, it was the way provided for her use, she was very familiar with it, she had hold of the rail and was trying to go safely, and it does not appear that she knew the stairs were so slippery that it would be careless to try to pass over them. The fact that she knew there was some danger in trying to go over them does not show, as matter of law, that she was negligent. This part of the case was rightly submitted to the jury." Citing, among other cases, *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155 (the case at bar).

In stating the facts in *MAHONEY v. DORE*, *supra*, the court said: "The plaintiff fell and was hurt on a flight of stairs, consisting of twelve or thirteen steps leading from the kitchen of the defendant's boarding house out of doors to the back yard. The stairway was covered and enclosed except on the side towards the yard, and there was a skylight over a portion of it in which two or three panes of glass had for a long time been broken, so that rain, snow and sleet came through and fell upon the stairs below. The evidence tended to show that at the time of the accident the

weather was cold and it was snowing and that the stairs were slippery from snow and ice upon them. The plaintiff had occasion to use these stairs frequently as a servant of the defendant and it was the duty of the defendant to keep them safe so far as the exercise of reasonable care and diligence on her part would accomplish that result. It was a duty of which she could not relieve herself by delegating it to another. If she could properly intrust a part of the work to a mere servant she, or somebody representing her for whose conduct she would be responsible, must exercise reasonable care and supervision to see that the desired result was attained. In view of the fact that the glass over the stairs had been broken out for a long time, exposing the stairs to an accumulation of snow and ice, we are of opinion that it was a question for the jury whether she was negligent in allowing the stairs to become slippery, and that it cannot be said, as matter of law, that she is relieved from liability even if it was the duty of her servant, the engineer, to clean the stairs, and if his negligence contributed to the plaintiff's injury. *Moynihan v. Hills Co.*, 146 Mass. 586 (15 Am. Neg. Cas. 602, *ante*)." * * * Defendant's exceptions to verdict returned for plaintiff were overruled.

outside the building, leading from the ground to a platform, which led to a door, and which door led to the room in which the plaintiff worked; that this was the only stairway provided for entering and leaving said room; that during the winter of 1890 and 1891 there were about fifty women employed in said room, and that all of them used said stairway; that in another building opposite the side of said stairway and about twenty-eight feet from said stairway, there was a steam exhaust pipe which came through the side of the building at the third story, and about thirty feet west of said stairway; that the said stairway had been icy a large part of the winter; that the spray from the steam from the said pipe frequently fell upon said steps and platform, and froze thereon, making them slippery; that on the evening of the 16th, and on the day of the 17th of March, 1891, all of said steps were covered with ice, rough and uneven, and so thick that the wood of the steps could not be seen, and so dangerous to passage thereon that, on the said 17th two or more women who worked in said room jumped from a platform on one side of said stairway, and which was about four feet high, and one or two other women came down from step to step in a sitting position; that the bottom step was covered out of sight with snow and ice; that the plaintiff took her dinner with her; that she left work to go home about five o'clock on the evening of March 17, 1891; that said stairway had a railing on one side, and a platform on the other; that she took her dinner-pail in one hand, and a hold on the railing, which was icy, with the other, and walked down the steps; that when she stepped down upon the step next to the bottom one, she slipped, fell down, and was injured; that said step from which she fell was old and worn, and icy as aforesaid.

"It appeared that the plaintiff well knew the condition of the steps, that they were old and worn, and also knew the location of the steam waste pipe, and that it threw spray upon the steps in question, and caused them to be icy in freezing weather; and the plaintiff testified that the steps were icy, and that she saw they were icy before she went down, and before she started to go down.

"The defendant offered evidence tending to prove that the plaintiff might have come out of the building and gone home without coming down said stairway; that when the wind blew in the direction of the steps, it carried said spray thereon, and that the engine which caused said steam to flow was in opera-

tion at odd times, such as high or low water, and about one-eighth of the year altogether."

At the close of the evidence, the judge ruled, at the request of the defendant, that the plaintiff could not maintain her action, and directed a verdict for the defendant; and the plaintiff alleged exceptions. *Exceptions sustained.*

T. B. O'DONNELL, for plaintiff.

T. M. BROWN, for defendant.

Knowlton, J.—There was evidence proper for the consideration of the jury on the question whether the defendant corporation was negligent in permitting the steps on which the plaintiff was injured to be slippery and dangerous. It was its duty to provide on its premises a reasonably safe passageway for the use of its employees in going to and from their work.

There was evidence that fifty women working in the same room with the plaintiff used the steps daily; and it was a question of fact for the jury whether the plaintiff was in the exercise of due care in trying to go down the steps as she did at the time of the accident. The fact that she knew them to be icy, and more or less slippery and dangerous, does not require us to hold, as matter of law, that she was negligent in trying to go down them, holding by the rail,—especially if she had no other way of getting from the mill.

The ground on which the ruling for the defendant was made was doubtless that the plaintiff, knowing the icy condition of the steps, assumed the risk of accident, and thereby precluded herself from recovering.

It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, *volenti non fit injuria*. The reason on which it is founded is, that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is.

In the present case, it does not appear that the steps were icy, or that there was any reason to suppose that the business involved a risk in regard to them, when the plaintiff entered the defendant's service. It can not be held that when she

made her contract she assumed the risk of such an injury as she afterwards received. We, therefore, come to the question whether, by her conduct since, she has assumed such a risk.

The doctrine, *volenti non fit injuria*, has not been very much discussed in the cases in this Commonwealth, but it is well established in the law, and it has been repeatedly recognized by this court. *Horton v. Ipswich*, 12 Cush. 488; *Wilson v. Charlestown*, 8 Allen, 137; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282 (1); *Lovejoy v. Boston & Lowell R. R.*, 125 Mass. 79; *Yeaton v. Boston & Lowell R. R.*, 135 Mass. 418; *Scanlon v. Boston & Albany R. R.*, 147 Mass. 484; *Wood v. Locke*, 147 Mass. 604; *Mellor v. Merchants' M'fg Co.*, 150 Mass. 362; *Lewis v. N. Y. & N. E. R. R.*, 153 Mass. 73; *Miner v. Conn. River R. R.*, 153 Mass. 398 (2). In England it has been much discussed, and the difficulties in the application of it have frequently been considered by the courts. The rule of law briefly stated is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is said that the defendant no longer owes him any duty; sometimes, that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another the doctrine is given effect, as showing that in a case to which it applies there is either no negligence towards the plaintiff on the part of the defendant, or a want of due care on the part of the plaintiff (3).

1. In *HUDDLESTON v. LOWELL MACHINE SHOP*, 106 Mass. 282, where plaintiff, a watchman in defendant's shop, was injured by a defect in the floor of a room in which he was attending to his duties, it was held that the evidence justified submission to a jury on the question of defendant's negligence in allowing the flooring to become dangerous, and as to whether plaintiff could have avoided the danger. Case ordered to stand for trial.

2. The Massachusetts cases cited in the opinion in the case at bar are reported or noted with the Massa-

chusetts cases in this volume of AM. NEG. CAS.

3. For a full discussion of the doctrine of *volenti non fit injuria*, with the English and American authorities, see 13 AM. NEG. CAS. 77-94. and the references to other cases which discuss the doctrine. See, also, a more recent Massachusetts case, *Davis v. Forbes*, 171 Mass. 548, 4 AM. NEG. REP. 289 (decided in 1898), and the note in 4 AM. NEG. REP. 289-290. The dissenting opinion in that case by Mr. Justice Knowlton cites numerous English and American authorities.

In *Thomas v. Quartermaine*, 18 Q. B. Div. 685, Bowen, L. J., says: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk." It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in a general sense, culpably responsible, should hold that other responsible in damages for the consequences of his own exposure. In *Yarmouth v. France*, 19 Q. B. Div. 647, Lord Esher, M. R., expresses the opinion that in such a case it is incorrect to say that the defendant no longer owes a duty to the plaintiff, but that it should rather be said that the duty is one of imperfect obligation, performance of which the law will not enforce.

It may be said that the voluntary conduct of the plaintiff in exposing himself to a known and appreciated risk is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury; or at least is such participation in the defendant's conduct as to preclude the plaintiff from recovering on the ground of the defendant's negligence. Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he can not recover, and should not be permitted to consider the conduct of the defendant by itself and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful.

But this principle applies only when the plaintiff has voluntarily assumed the risk. As is said by Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, the maxim is not *Scienti non fit injuria*, but *Volenti non fit injuria*. The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he

does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show, as matter of law, that the risk is understood and appreciated; and often they may present in that particular a question of fact for the jury.

What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself to a known risk, is a question about which learned judges differ in opinion. It has been held by some, that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. See opinion of Lord Bramwell, in *Membery v. G. W. R'y*, 14 App. Cas. 179, and the dissenting opinion in *Eckert v. Long Island R. R.*, 43 N. Y. 502 (12 Am. Neg. Cas. 397*n*). But by the authorities generally one who in an exigency reluctantly determines to take a risk is not held so strictly. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In *Membery v. G. W. R'y*, 14 App. Cas. 179, Lord Bramwell expressed the opinion that the plaintiff can not recover in such a case, while the Lord Chancellor and Lord Herschell, without expressing an opinion, prefer to keep the question open for future consideration. In *Thrussell v. Handyside*, 20 Q. B. Div. 359, the Court of Queen's Bench held that a workman, by continuing to work under such circumstances, does not voluntarily assume the risk; and in *Yarmouth v. France*, 19 Q. B. Div. 647, a majority of the Court of Appeal were of the same opinion.

In *Sullivan v. India M'fg Co.*, 113 Mass. 396, 15 Am. Neg. Cas. 527, *ante*, is the following language: "Though it is a part of the implied contract between master and servant (where there is only an implied contract), that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself,

he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents therefore to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, it is said: "There was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." In *Leary v. Boston & Albany R. R.*, 139 Mass. 580, Mr. Justice Devens uses these words: "But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

In this Commonwealth, as well as elsewhere, plaintiffs have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterwards. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Pingree v. Leyland*, 135 Mass. 398; *Moulton v. Gage*, 138 Mass. 390; *Taylor v. Carew M'fg Co.*, 140 Mass. 150; *Gilbert v. Guild*, 144 Mass. 601; *Murphy v. Greeley*, 146 Mass. 196; *Wood v. Locke*, 147 Mass. 604; *Mellor v. Merchants' M'fg Co.*, 150 Mass. 362; *Lothrop v. Fitchburg R. R.*, 150 Mass. 423; *Lewis v. N. Y. & N. E. R. R.*, 153 Mass. 73; *Miner v. Conn. River R. R.*, 153 Mass. 398.

This court has recognized the doctrine that mere knowledge of a danger will not preclude a plaintiff from recovering unless

he appreciates the risk. *Linnehan v. Sampson*, 126 Mass. 506; *Lawless v. Conn. River R. R.*, 136 Mass. 1; *Williams v. Churchill*, 137 Mass. 243; *Taylor v. Carew M'fg Co.*, 140 Mass. 150; *Ferren v. Old Colony R. R.*, 143 Mass. 197; *Scanlon v. B. & A. R. R.*, 147 Mass. 484. See, also, *Thomas v. Quartermaine*, 18 Q. B. Div. 685, and *Yarmouth v. France*, 19 Q. B. Div. 647. Many other cases in which the plaintiff has not been precluded from recovering may be referred to this principle, and some of them more properly rest on the ground that there were such considerations of duty or exigency affecting him as to present a question whether the assumption of the risk was voluntary, or under an exigency which justified his action, and induced him unwillingly to encounter a danger to which he was wrongfully exposed. *Thomas v. W. U. Tel. Co.*, 100 Mass. 156; *Mahoney v. Met. R. R.*, 104 Mass. 73; *Lyman v. Amherst*, 107 Mass. 339; *Looney v. McLean*, 129 Mass. 33; *Dewire v. Bailey*, 131 Mass. 169; *Gilbert v. Boston*, 139 Mass. 313; *Pomeroy v. Westfield*, 154 Mass. 462; *Eckert v. Long Island R. R.*, 43 N. Y. 502. Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to repair it, we need not decide in this case. See *Leary v. B. & A. R. R.*, 139 Mass. 580; *Haley v. Case*, 142 Mass. 316; *Westcott v. N. Y. & N. E. R. R.*, 153 Mass. 460 (1).

We are of opinion that it can not be said, as matter of law, that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different.

1. The Massachusetts cases cited appear with the Massachusetts cases in this volume of AM. NEG. CAS.

Besides, there was evidence tending to show that she had no way of leaving the defendant's mill except by going down the steps, and that was important to be considered in deciding whether she took the risk voluntarily.

Osborne v. L. & N. W. R'y, 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in *Yarmouth v. France*, 19 Q. B. Div. 647, and *Thomas v. Quartermaine*, 18 Q. B. Div. 685: "Those observations go far to make it hard for a defendant to succeed on such a defense as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that can not be helped. These judgments introduce an important qualification of the maxim '*volenti non fit injuria*.' In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow."

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

FEMALE EMPLOYEE FALLING INTO TRAP AND OPENING IN WORK ROOM—MASTER LIABLE.—In **HOGARTH v. POCASSET MANUFACTURING CO.**, 167 Mass. 225 (October, 1896), female employee injured by falling into a trap and opening in the flooring of the work-room, defendant's exceptions to verdict for plaintiff were *overruled*. The Supreme Court (per HOLMES, J.) said: "This case is not unlike *Young v. Miller*, 167 Mass. 224, in its facts, except that here the plaintiff testified that she did not know of the trap-door. Her testimony is hard to believe, no doubt, as she passed over the door many times a day, and as the wheels of her bobbin-box probably jolted as they went over its hinges, but we cannot say that she must have known it. She may have been unusually absent-minded. Again, it does not follow from the fact that she took the risk of dangers permanently incident to the visible permanent structure (*Gleason v. N. Y. & N. E. R. R.*, 159 Mass. 68), that she must be assumed actually to have known of every detail of the structure, and therefore to have known of the trap-door and the possibility of its being open once in a while. Thus it will be seen that the case is stronger than *Young v. Miller*, *supra*, and

notwithstanding the decision in that case, which was very near the line, a majority of the court are of opinion that a jury might have found the plaintiff entitled to be warned to look out for the opening of the doors. On the evidence, the plaintiff was entitled to go to the jury, and the judge was right in refusing to rule the other way." * * *

FALLING INTO OPEN TRAP-DOOR — KNOWLEDGE OF DANGER — MASTER NOT LIABLE.— The case of **YOUNG v. MILLER**, 167 Mass. 224 (*October, 1896*), referred to in the HOGARTH case (preceding paragraph), is as follows:

"The plaintiff had been employed by the defendant in the defendant's factory in Brockton for nine years. He was a general workman, and it was a part of his duty to make the tools used by the other employees. In the course of this work he was accustomed to go frequently to that part of the factory called the machine room, entrance to which was gained by a door leading directly from the hallway in the factory. In front of this door, and eight inches from it, there was a trap-door in the floor of the machine room, which was used to give access to a pit in which was placed a blower. This trap-door was four feet six inches in length, and four feet two inches in width. It was made in two sections, each two feet one inch in width and four feet six inches in length. These sections when closed were level with the floor, and formed part of it, and were safe to walk upon. On May 17, 1895, during the noon hour, when the plaintiff was not required to work, while the defendant's engineer was in the pit cleaning the blower, and while one of the sections of the trap-door was up, the plaintiff came through the hallway, opened the door leading into the machine room, and walked into the pit. The section of the trap-door had been left open by the engineer in order that he might have sufficient light for his work. The opening in the floor for the trap-door had been cut by the plaintiff himself about one year and a half before the accident, and the plaintiff had assisted in putting the blower into the pit through the trap-door. The trial court directed verdict for defendant. Plaintiff excepted. HOLMES, J., delivered the opinion by the Supreme Court as follows: "The plaintiff knew the permanent elements of the danger to which he was exposed. He knew that the trap-doors were where they were, and that they were likely to be opened from time to time. The doors of themselves were not a defect, and he took the risk of them. The only thing he did not know was the precise moment when the doors would be raised, but that he could find out if he looked. They were raised and the accident happened during the noon hour, at which time the plaintiff was not called on to work. A majority of the court are of opinion, although I share the doubts of the minority,

that the defendant's duty did not extend to giving notice or warning that the doors were open to one who knew that they were liable to be so at any time. See *Keenan v. Edison Electric Illum. Co.*, 159 Mass. 379, 15 Am. Neg. Cas. 638, *ante*; *McCann v. Kennedy*, 167 Mass. 23, 15 Am. Neg. Cas. 581, *ante*. Exceptions overruled."

CARPENTER FALLING INTO OPENING IN PASSAGEWAY OF ROOM OF BUILDING BEING CONSTRUCTED — CONTRACTOR AND CONTRACTEE — ASSUMPTION OF RISK.— In **MURPHY, ADM'X v. GREELEY**, 146 Mass. 196 (*February, 1888*), employee falling into opening in passageway in store-room of building being constructed as a family hotel, plaintiff's exceptions to verdict directed for defendant were *overruled*. The opinion by KNOWLTON, J., states the case as follows:

"To determine whether the defendant neglected his duty towards the plaintiff's intestate, we must first inquire what were the relations out of which his duty grew. He had a contract with the owner to do all the carpenter work upon a large brick building five stories high, then in process of erection. Its outer walls and inside brick partitions were all completed, and the openings for windows were filled with sashes of cotton cloth. The flooring on the first floor had been laid, but the wooden partitions there had not been erected, and the carpenter-work in general was not far advanced. The plaintiff's intestate, James Sinnott, made a contract with him to do the furring of a room upon the first floor, at a certain price per square yard. The only duty which he owed Sinnott grew out of this contract. The passageway to the place where the work was to be done extended from the main entrance through the building a considerable distance to the room to be furred, and there was evidence that near the center of the building the locality about the passageway was at times very dark; that at the time of the accident it was so dark that one could not see his hand before his face; and that Sinnott having stopped work at about five o'clock on account of the darkness, it being winter, attempted to go out through this passageway, mistook his course, went through an opening in the wall which led to a room in the floor of which was an open space for a stairway to the basement, fell through this open space, and was injured. He testified that there was no other way than through this passageway to get to the room where the work was to be done, and it is to be presumed that he passed through it when he was shown the room at the time he took his contract. He entered by it in the morning on each of the two days that he worked. He was fifty-five years of age, a carpenter by trade, in full possession of all his faculties, and he had worked in the construction of buildings for more than twenty years.

"In connection with such a contract, made under such circumstances, the law implied no contract on the part of the defendant, and imposed no duty upon him to have the building in such a condition that persons could wander through it in the darkness away from the regular passageway without risk of falling. Nor was it his duty to maintain artificial lights for those who should choose to attempt to go through after nightfall.

"The burden was upon the plaintiff to show that the accident happened through the negligence of the defendant. The defendant was under no obligation to provide against the ordinary risks incident to the performance of the contract which the plaintiff's intestate entered into, nor against any special risks incident to the peculiar manner in which he might perform it. If it can fairly be said, contemplating the probabilities from the situation of the parties when they made their contract, that there was any risk that Sinnott would remain at his work until it was so dark in the passageway that he could not see his hand before his face, and then attempt to go through there without a light, and meet with an accident, that must be deemed to have been an ordinary risk of the business which he contracted to do, on a risk growing out of the peculiar manner in which he chose to do it. We do not think there was any evidence of negligence on the part of the defendant.

"The testimony introduced in relation to the custom and usage of builders in reference to openings in the floors of buildings while in the process of construction, taken in connection with the testimony of the plaintiff's intestate as to his experience as a carpenter, tended to show what he had reason to expect, and what dangers he was called upon to guard against, and so was competent upon the question whether he was in the exercise of due care. Whether or not it was admissible for any other purpose, in the form in which it was presented, it is unnecessary to decide. Exceptions overruled."

Employee falling into well of hot water — Assumption of risk.

In *FEELY v. PEARSON CORDAGE CO.*, 161 Mass. 426 (May, 1894), employee falling into well of hot water in defendant's factory, defendant's exceptions to verdict returned for plaintiff were *sustained*. The opinion by MORTON, J., states the case as follows: "For most of the time during the four or five weeks that the plaintiff had been working for the defendant he had known of the well. Sometimes the barrel from which he got the washers was nearer to, and sometimes farther from it. The defendant was under no obligation to the plaintiff to cover the well or keep the floor dry. *Murphy v. American Rubber Co.*, 159 Mass. 266, and cases cited. The danger of slipping or of falling into the well was an obvious one, and the plaintiff must be held to have assumed the risk. It does not

matter that he did not know the precise extent or character of the injury which he would sustain if he fell into the well. Such a test would introduce an impracticable element into the doctrine of assumption of the risk. It is enough that he knew that he might fall into the well, and continued at his employment without objection. He must be held to have assumed the risk of whatever injury he might receive by falling into the well. It is not necessary to consider whether the plaintiff was in the exercise of due care, or was acting within the scope of his employment. Exceptions sustained."

EMPLOYEE FATALLY INJURED BY FALL OF MILL — DEFECTIVE SUPPORTS — KNOWLEDGE OF DEFECT BY EMPLOYEE — INSTRUCTION.— In **NOURSE, ADM'R v. PACKARD**, 138 Mass. 307 (*January, 1885*), defendant's exceptions to verdict for plaintiff were sustained and new trial granted, the Supreme Court (per MORTON, CH. J.) rendering the following opinion: "The plaintiff's intestate, Charles A. Nourse, was killed by the falling of a part of the defendant's mill, which contained a large quantity of grain. It is a reasonable conclusion from the evidence that he died from suffocation, and that he lived in a state of conscious suffering for a few minutes after the fall. The jury were therefore justified in finding that his death was not instantaneous. There was evidence tending to show that the supports of the mill were defective and insufficient, and that this caused the fall. The mill was divided into several large bins for the storage of grain; and the defendant's evidence tended to show that the defendant was not much about the mill, but that Nourse had the charge of it, directing and controlling the manner in which the grain should from time to time be received into the mill and distributed in the different bins. The defendant asked the judge who presided at the trial to instruct the jury, that 'if the jury find that the plaintiff's intestate had the sole charge and control of the placing and storing of grain in the defendant's mill, and of the quantity to be taken into the same, and had the same knowledge, means of knowledge, and opportunity to examine the supports of the mill which the defendant had, and at the time of the accident he so loaded the mill as to quantity or distribution of the grain as to cause the accident, then he was not in the exercise of due care, and this action cannot be maintained.' The judge refused to give this instruction; and, upon the subject embraced in it, merely instructed the jury that 'the plaintiff must show further that her husband was at the time in the exercise of due and ordinary care, such as a prudent person may be expected to use under the same circumstances. If he was in the exercise of due and ordinary care, so far as that point is concerned, she is enti-

tled to recover. If his own negligence or want of care contributed to the injury, then she cannot recover.' The instruction requested, considered as a proposition applicable to every aspect of the case, may not be strictly correct. But there was one aspect of the case in which it ought to have been given. The plaintiff relied upon evidence showing that the defendant knew of the defective condition of the posts or supports of the mill, which caused the accident. The instruction was framed with reference to this evidence. If the jury found that he was negligent upon this ground, then the instruction requested was correct. For if the plaintiff had the same knowledge, and, being in sole charge of the distribution of the grain in the different bins, he purposely or thoughtlessly overloaded the bin supported by the defective post, the accident was caused by his negligence. The defendant was fairly entitled to the substance of his requested instruction, if the jury took the view, which seems to be the view upon which the plaintiff relied, that the defendant knew the unsafe condition of the supports of the mill. It is the duty of the court to give specific instructions when they are called for by the circumstances of the case. By the refusal to give the instruction requested, and by the failure to give any instructions upon the subject, the jury would or might be led to infer that the question of Nourse's knowledge of the condition of the supports was of no consequence, and their minds would be led away from the question to which the request was directed, whether the accident was not caused by the fault of Nourse in distributing the grain. We think instructions should have been given on this subject, and that the very general instructions which were given did not fully and fairly protect the rights of the defendant. We are therefore of opinion that there should be a new trial. Exceptions sustained." (B. W. HARRIS and C. W. SUMNER appeared for defendant; E. L. BARNEY, and H. L. BAKER, for plaintiff.)

FEMALE EMPLOYEE INJURED IN TRYING TO ESCAPE FROM FIRE IN MILL — NONSUIT.— In **JONES v. GRANITE MILLS**, 126 Mass. 84 (*December, 1878*), female employee injured in fire in defendant's mill, she trying to escape by window and falling to ground, due to alleged negligence of defendant in failing to provide proper means of escape in case of fire, plaintiff was *nonsuited*, it being held that no common-law liability attached to defendants where no evidence of negligence was shown in the matter of providing proper appliances for fire purposes (1). On the question of

1. The case of **KEITH, ADM'R v. GRANITE MILLS**, 126 Mass. 90 (*December, 1878*), arose out of the same accident as in the case at bar, a fire in defendant's mill, and at a trial in the Superior Court a verdict was ren-

providing means of escape, the Supreme Court (per ENDICOTT, J.) said:

"The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arises upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences. The master is not liable to the servant unless he has been negligent in something which he has contracted or undertaken with his servants to do, and he has not undertaken to protect him from the results of casualties not caused by him or beyond his control. See *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

"It is no part of the contract of employment between master and servant so to construct the building or place where the servants work, that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places where large numbers of persons are employed may be proper subjects of legislative action, and such an Act has been passed since this catastrophe. Statute 1847, c. 214." * * *

Employee injured by defective flooring in ice-plant building — Master liable.

In *HANLON v. THOMPSON*, 167 Mass. 190 (*November, 1896*), tort, for personal injuries sustained by plaintiff, while in defendant's employ, at an ice plant in Haverhill, by the alleged negligence of the defendant in permitting the floor of a building to be in an unsafe condition, defendant's exceptions to verdict returned for plaintiff were overruled. It appeared that plaintiff was not hired by defendant, but by one Cushman, who had sold the ice business to defendant. The Supreme Court (per ALLEN, J.) said: "There was evidence sufficient to warrant a finding that the plaintiff was in the employment of the defendant. It is true that the plaintiff was not hired by the defendant personally, and that both Cushman and the defendant testified that Cushman had agreed to fill the ice-houses, and that the men were employed by Cushman to do the work. But from the other testimony the jury might think that these statements ought not to be taken as literally accurate. Cushman's testimony

dered for defendant, to which plaintiff alleged exceptions. The Supreme Court stated that the rules of law applicable to the case were the same as those in *Jones v. Granite Mills* (the case at bar), and overruled the exceptions.

was somewhat qualified by his cross-examination. And the defendant, on cross-examination, admitted that he employed one or two teamsters to haul ice from the pond to the ice-houses, and another witness testified that he worked for the defendant in delivering ice from the ice-houses to customers. There was also evidence that the defendant owned all the teams and other personal property used in the business, and that the men were paid at his office by his agent." * * *

DANGEROUS PLACE TO WORK — MIXING MORTAR — SICK EMPLOYEE OVERCOME BY EPILEPTIC FIT — KNOWLEDGE OF SICK CONDITION — PROOF.— The case of **CROWLEY v. APPLETON**, 148 Mass. 98 (*November, 1888*), turned mainly upon the question as to whether the plaintiff knew he was subject to epileptic fits. From the bill of exceptions the nature of the case was as follows:

"There was evidence tending to prove that the plaintiff was subject to epileptic fits, in which he became unconscious; that the plaintiff was not aware and did not know that he was subject to said fits; that during the time he was subject to such fits he had worked for the defendant, who was a stone mason, in digging cellars and mixing mortar and similar work; that during this time the defendant knew that the plaintiff was subject to such fits; that the attacks would be so sudden as to cause the plaintiff without any premonitory symptoms to become instantly unconscious, and that he would fall; that upon the recovery of consciousness he would resume the work he was engaged in just prior to their attack; that upon one occasion, when the plaintiff's wife asked the defendant to give him work which was not dangerous, the defendant said that it was very singular that the plaintiff did not know that he had fits; and that subsequently the plaintiff, having been set to work by the defendant in mixing mortar, had a sudden attack of epilepsy, and fell into the mortar bed in an unconscious condition, receiving the injuries." * * *

"The judge, among other things, instructed the jury, that, for the plaintiff to maintain his action, it was necessary for him to prove the four following propositions: 1. That the plaintiff had such fits. 2. That the plaintiff had no knowledge of said fits. 3. That the defendant knew the plaintiff had said fits. 4. That the defendant knew or had cause to know that the plaintiff did not know anything about it." * * *

Plaintiff excepted to the exclusion of certain evidence and to refusal to charge as requested. The jury returned verdict for defendant which was sustained by the Supreme Court. Plaintiff's exceptions overruled.

DANGEROUS PLACE TO WORK — LEAD POISONING — MASTER LIABLE.— In **SHEA v. GLENDALE ELASTIC FABRICS COMPANY**, 162 Mass. 463 (*December, 1894*), tort, for personal injuries sustained by plaintiff by lead poison from inhaling dust containing white lead coming from the rubber thread on which he worked in defendant's mill, verdict for plaintiff was sustained, and defendant's exceptions overruled. The points are stated in the syllabus to the official report as follows: "On the question whether the illness of the plaintiff was caused by lead poisoning from inhaling dust containing white lead coming from the rubber thread on which he worked in the defendant's mill, evidence is competent that other persons, some of whom worked at the same time in the same room with the plaintiff under similar conditions, and some of whom worked there under similar conditions a few months before and a few months after him, were ill from lead poisoning; that a former employee of the mill, after working there for three and a half or four months, a short time before the plaintiff was there, was ill and had the same symptoms; and that a physician, at a time which he could not fix exactly, had a number of like cases in patients coming from the same room of the defendant's mill." Opinion by KNOWLTON, J., who cited numerous cases, among them being, *Baxter v. Doe*, 142 Mass. 558; *Hunt v. Lowell Gas Light Co.*, 1 Allen, 343, and 8 Allen, 169; *Hodgkins v. Chappell*, 128 Mass. 197; *Brierly v. Davol Mills*, 128 Mass. 291; *Reeve v. Dennett*, 145 Mass. 23; *Crocker v. McGregor*, 76 Me. 282; *Boyce v. Cheshire R. R.*, 43 N. H. 627; *Darling v. Westmoreland*, 52 N. H. 401; *Cleaveland v. Grand Trunk R'y*, 42 Vt. 449; *House v. Metcalf*, 27 Conn. 631; *Field v. N. Y. Cent. R. R.*, 32 N. Y. 339; *Grand Trunk R. R. v. Richardson*, 91 U. S. 454; *Dist. of Col. v. Armes*, 107 U. S. 519, 524; *Brown v. Eastern & Midlands R'y*, 22 Q. B. Div. 391, 393.

NOTES OF MASSACHUSETTS CASES ARISING OUT OF MISCELLANEOUS INJURIES SUSTAINED BY EMPLOYEES.

Falling from raised platform — Assumption of risk.

In **MOULTON v. GAGE ET AL.**, 138 Mass. 390 (*January, 1885*), verdict directed for defendant was sustained, the case being stated in the syllabus to the official report as follows: "If a person is employed upon a raised platform, not guarded by a railing, to assist in guiding blocks of ice over wooden tracks, adjoining the platform, from an elevator at the top to a house at the bottom, he cannot maintain an action against his employer for an injury caused by his falling off the side of the platform, the absence of the railing and the risks consequent thereon being as well known to him as to his employer."

Falling through platform — Injured by molten brass — Master not liable.

In *BOYLE, ADM'X v. MOWRY AND ANOTHER*, 122 Mass. 251 (March, 1877), plaintiff's exceptions to verdict rendered for defendants were overruled, in action for injuries to plaintiff's intestate, who was a "melter" in defendants' brass foundry, by his falling through a platform in defendants' foundry and the overturning upon him of the contents of a crucible of molten brass.

Painter burned by varnish catching fire — Knowledge of danger.

In *LYONS, ADM'X v. BOSTON TOWAGE & LIGHTERAGE CO.*, 163 Mass. 158 (February, 1895), verdict directed for defendant was sustained, the opinion by HOLMES, J., stating the case as follows: "The plaintiff's intestate, Michael Lyons, was ordered to paint the inside of a tank with black varnish. While he was doing so, and a fellow-workman was holding a torch for him at his suggestion, the fumes of the varnish caught fire from the torch and he was burned so badly that he died. Lyons had worked for the defendant twelve years. It was part of his regular business to paint this and other tanks, and he had done so a good many times. Black varnish was the paint used. The tank had to be painted about once a year. We assume that black varnish is dangerous in the sense that it is liable to generate inflammable fumes, but any dangers incident to the use of black varnish in general the defendant had every reason to believe to be as well known to Lyons as to itself. After twelve years he would be supposed to have taken the risk of them. There was no evidence that the varnish used on this occasion was of inferior quality, or different from what always had been used, except the fact of the accident. There was no evidence that the defendant knew of the difference, if there was any. There was no evidence that it contemplated the use of a torch, which came from Lyon's own suggestion. We do not perceive any particular in which the defendant fairly can be said to have failed in its duty. Exceptions overruled."

Employee injured by defective carboy of vitriol and sulphuric acid — Fellow-servant.

In *MOODY v. HAMILTON MANUFACTURING CO.*, 159 Mass. 70 (May, 1893), plaintiff's exceptions to verdict directed for defendant were overruled. The second count of the declaration, upon which the case was tried, was as follows:

"And the plaintiff says that on or about April 15, 1891, while the plaintiff was in the employ of the defendant as a servant for hire, and in the exercise of due care, he received great personal injuries owing to the carelessness and negligence of the defendant and its agents directing him to work on or about a carboy of vitriol and sulphuric acid which was defective and dangerous, and the defendant and its agents carelessly and negligently failed to notify the plaintiff of the danger he was subjected to, and while the plaintiff was handling said carboy he received great personal injuries from vitriol striking him, to the damage of the plaintiff, and he says, the sum of thirty thousand dollars."

The point decided turned on the question of fellow-servant, the ruling by LATHROP, J., being stated in the syllabus to the official report as follows:

"A master is not responsible, at common law, for the negligence of a superior servant, even in giving orders, whereby injury is sustained by an

inferior servant; and the rule applies where the superior servant is the foreman or the superintendent, and the inferior servant a laborer."

Teamster injured while driving under gateway — Master liable.

In *HALEY v. CASE AND ANOTHER*, 142 Mass. 316 (July, 1886), where plaintiff, a teamster in defendants' employ, was injured while driving a wagon containing several bundles of hay under a gateway, defendants' exceptions on verdict returned for plaintiff for \$5,000 were overruled.

Defective harness — Employee injured while driving.

In *LEVESQUE v. JANSON*, 165 Mass. 16 (November, 1895), it was held (as per syllabus to the official report) that: "An action for personal injuries occasioned to the plaintiff while in the defendant's employ, by the breaking of the harness upon the defendant's horse while driven by the plaintiff, cannot be maintained if the evidence shows that there was such a combination of a vicious horse and old rotten harness that an accident was reasonably to be expected, and that the plaintiff was wanting in due care in using them together; and the promise of the defendant that he would fix the harness or get a new one is not a sufficient excuse." Plaintiff's exceptions on verdict directed for defendant were overruled. Opinion by MORTON, J.

Employee injured by being thrown out of wagon — Fellow-servant.

In *MCGUIRK v. SHATTUCK ET AL.*, 160 Mass. 45 (October, 1893), it appeared that plaintiff was employed as a laundress by the defendants and that Mrs. Shattuck sent a team, driven by defendants' coachmen, to bring plaintiff from her home to defendants, and on one of such occasions an accident occurred and plaintiff was thrown out of the wagon and her arm was broken. At the trial a verdict was directed for defendants and plaintiff alleged exceptions. The Supreme Court overruled the exceptions, holding that "the plaintiff must be regarded as having been in the service of the defendants at the time of the accident. Whether the transportation of the plaintiff was entirely gratuitous, as it seems to have been, or whether it was in pursuance of such an understanding between the parties that it may be deemed to have been a part of the contract, in either case it was incident to the service which the plaintiff was to perform, and closely connected with it. * * * The accident happened, it would seem, in consequence of the negligence of the driver, who was a fellow-servant of the plaintiff. There was no evidence that the defendants were negligent in the employment of this driver, and there is no contention or suggestion by the plaintiff to that effect. The case, therefore, is the ordinary one where an accident has occurred through the negligence of a fellow-servant, and no recovery can be had." * * *

LIABILITY OF MUNICIPAL CORPORATIONS FOR INJURIES TO EMPLOYEES AND OTHERS.

Among the Massachusetts cases arising out of injuries to city employees and others, in which the liability of municipal corporations is involved, are the following:

Employees working in sewers, etc., injured by cave-in accidents, etc.

JOHNSON *v.* CITY OF BOSTON, 118 Mass. 114 (June, 1875) laborer in employ of person doing blasting work for the city injured by cave-in of sewer; fellow-servant ruling; judgment rendered on the verdict for defendant.

McDERMOTT *v.* CITY OF BOSTON, 133 Mass. 349 (September, 1882); laborer engaged in putting in iron pipes in reservoir, injured by being caught in tackle; fellow-servant ruling; judgment on verdict for defendant.

JOYCE *v.* CITY OF WORCESTER, 140 Mass. 245 (October, 1885); city laborer at work in sewer injured by upsetting of derrick; assumption of risk; verdict for defendant.

BREEN *v.* FIELD ET AL., SELECTMEN OF TOWN OF GREENFIELD, 159 Mass. 582 (October, 1893); laborer laying pipes in sewer injured by cave-in of trench; assumption of risk; verdict for defendants. See also former decision in BREEN *v.* FIELD, 157 Mass. 277.

In FLYNN *v.* CITY OF SALEM, 134 Mass. 351 (March, 1883), tort, for injuries sustained by plaintiff, a city laborer, caused by the cave-in of a trench in which he was working, negligence of the defendant's superintendent being alleged, *judgment and verdict for plaintiff was set aside and demurrer sustained*, the opinion rendered by FIELD, J., being as follows: "The declaration alleges 'that the defendant was guilty of negligence in the premises,' but the only negligence specifically set out is the negligence of the superintendent of said work, who was the agent of the defendant for that purpose.' The declaration does not clearly show for what purpose the trench was being dug, whether the defendant was an officer of the city or not, or what his duties were. *Prima facie*, a person employed to superintend the digging of a trench is a fellow-servant with the laborer employed to dig it, when the superintendent and the laborer are employed by the same master. Zeigler *v.* Day, 123 Mass. 152, 15 Am. Neg. Cas. 668, *ante*; Johnson *v.* Boston, 118 Mass. 114, 15 Am. Neg. Cas. 706, *ante*; O'Connor *v.* Roberts, 120 Mass. 227, 15 Am. Neg. Cas. 669, *ante*; Killea *v.* Faxon, 125 Mass. 485, 15 Am. Neg. Cas. 607, *ante*. If there were any facts, of which the legal effect was that the superintendent and laborer were not fellow-servants, they should have been stated in the declaration.

In FITZSIMMONS, ADM'X *v.* CITY OF TAUNTON, 160 Mass. 223 (November, 1893), the syllabus to the official report sufficiently states the case as follows: "If, in an action for personal injuries occasioned to the plaintiff's intestate, by the caving in of the bank of a trench in which he was digging, there is some evidence that the defendant had notice of the danger and that the deceased had not, and there is also evidence that the precautions were not taken for the safety of the deceased which the defendant was bound to see taken, the jury are justified in returning a verdict for the plaintiff." Verdict for plaintiff sustained and defendant's exceptions overruled.

In COAN *v.* CITY OF MARLBOROUGH, 164 Mass. 206 (July, 1895), the city was held liable for injuries sustained by an employee engaged by it to work in the construction of a sewer in one of its streets, caused by failure to properly brace the sides of a trench. The action was brought under the Employers' Liability Act. Opinion by BARKER, J., who cited numerous cases on the liability of municipal corporations for injuries sustained by its employees.

City liable for negligent act of incompetent employee causing injury to another employee.

In *MONAHAN v. CITY OF WORCESTER*, 150 Mass. 439 (January, 1890), plaintiff's exceptions to verdict for defendant were sustained. At the trial in the Superior Court there was evidence tending to show that on May 25, 1886, plaintiff was employed by defendant in the construction of a sewer in a street under the tracks of a railroad; that one McLoughlin was also employed by defendant, and was then engaged in wheeling bricks upon a hand barrow from a pile in the street across the railroad track to the edge of the trench in which plaintiff was at work; that just before the accident McLoughlin having loaded the barrow with bricks, started to wheel it across the track; that the wheel of the barrow struck the farther rail of the track, causing the barrow to tip and McLaughlin to lose his hold upon it, whereupon a portion of the load was emptied into the trench and fell upon plaintiff; that McLoughlin was sixty-two years old and physically infirm, with seriously impaired sight and hearing, and that the injuries were due to McLoughlin's lack of capacity properly to do the work which he was then engaged in doing. Evidence offered by plaintiff to show McLoughlin's infirmity was excluded. The Supreme Court (per FIELD, J.,) held that such evidence was competent." The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant."

Miscellaneous cases.

In *HOPPIN v. CITY OF WORCESTER*, 140 Mass. 222 (October, 1885), plaintiff's exceptions on verdict directed for defendant were overruled, the syllabus to the official report stating the case as follows: "The committee on highways of a city directed the highway commissioner to erect a building to be used to contain a machine for crushing stone for the highways of the city. The commissioner employed A., a master builder, to furnish the labor and tools required in the erection of the building. The city paid A. and the men employed by him for their services, and furnished all the materials used in the erection of the building. A. directed B., one of the men employed by him, to erect a staging for the purpose of shingling the roof of the building, and to use therefor certain brackets which belonged to A. B. used the brackets for the support of the staging. One of the brackets, being defective, broke, and the staging, upon which C. was working, fell, and he was injured. *Held*, that C. could not maintain an action against the city for his injury."

In *JENSEN v. CITY OF WALTHAM*, 166 Mass. 344 (June, 1896), plaintiff's exceptions to verdict directed for defendant were overruled, the syllabus to the official report stating the case as follows: "A city is not liable for the negligence of a laborer employed by its superintendent of streets in the construction of a new street which had been laid out by the board of aldermen, and which they have directed the superintendent to build, if, under the charter of the city, the superintendent was acting as a public

officer in employing the laborer and in constructing the street." Opinion by MORTON, J.

In *NEFF v. INHABITANTS OF WELLESLEY*, 148 Mass. 487 (February, 1899), tort, for personal injuries sustained by plaintiff while traveling on foot in the highway, in a collision with a wagon and horses driven by a servant of the defendant town, exceptions to verdict returned for plaintiff were overruled, the town being liable for the negligent act of its employee.

LIABILITY OF MASTER FOR TORT OF SERVANT RESULTING IN INJURY TO THIRD PERSON.

Fall of brick from staging and passer-by injured — Contractor of building not liable.

In *COOMES v. HOUGHTON*, 102 Mass. 211 (September Term, 1869), tort for injuries sustained by Emily N. Coomes, the plaintiff, from the falling upon her head, as she was traveling on the sidewalk of Main street in Springfield, of a brick dropped by an alleged servant of the defendant, Marcus Houghton, from a staging in front of a building adjoining the sidewalk, defendant's exceptions to verdict for plaintiff were sustained, it being held (as per syllabus to the official report) that "a contractor for a job, by accepting and paying for work done thereon by a mechanic without his prior order or authority, does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, but not a part or result of the work itself."

WHITE v. PHILLIPSTON, 10 Metc. (Mass.) 108, discusses the common-law remedy in actions against a master for the negligent act of his servant resulting in injury to a third party.

Servants of teamsters unloading wagon on sidewalk and passer-by injured by cask of oil — Defendants not liable.

In *MURPHY AND WIFE v. DEANE ET AL.*, 101 Mass. 455, the declaration was as follows: "And the plaintiffs say that the defendants are teamsters and common carriers, and as such were by their agents and servants engaged in unloading and delivering from a wagon a cask of oil across the sidewalk in Broad street, in Boston, into the warehouse of Mixer & Whitman there situate; and the female plaintiff was passing along said sidewalk at the same time, and in the exercise of due care attempted to pass over and across the skids then and there placed by the defendants' agents and servants from the wagon across the sidewalk into the warehouse, and then and there being used by them in unloading and delivering the cask of oil as aforesaid, that she might proceed upon her lawful business without delay; but the defendants' agents and servants so carelessly and negligently managed and handled said cask of oil, and so carelessly and negligently failed to control it, that said cask of oil came upon the female plaintiff, throwing her down with great violence, crushing and fracturing her hip, and inflicting other serious injuries upon her person, by reason of all which the female plaintiff has lost the use of her hip and leg, and has suffered great pain of body, and anguish of mind, has become permanently disabled, and her general

health permanently impaired." The trial resulted in verdict for defendants to which plaintiffs excepted. The Supreme Court overruled the exceptions.

Fall of iron from loaded truck — Boy injured — Question for jury.

In *LANE v. ATLANTIC WORKS*, 107 Mass. 104 (March, 1871), fall of iron from carelessly loaded truck on highway and passer-by injured, the plaintiff being a boy eight years old, verdict directed for defendant was set aside, as the case should have been submitted to the jury.

Poster bills left in road, blown by the wind and frightening horse — Owner of bills not liable.

In *SMITH v. SPITZ AND ANOTHER*, 156 Mass. 319 (May, 1892), the syllabus to the official report states the case as follows: "A bill poster employed to post up bills in certain places went to a town about fifteen miles away and deposited them in the road. Two of the bills were blown by the wind against the horse of the plaintiff's intestate, so that he took fright, ran away, and was killed. *Held*, in an action for the price of the horse against the owner of the bills, that, even if there was any evidence that the person who put the bills in the road was the defendant's servant, and not an independent contractor, he was not acting within the scope of his employment, and the defendant was not liable." Opinion by HOLMES, J.

Pedestrian run into by wagon on highway — Substitute for driver — Owner of wagon not liable.

In *WOOD v. COBB ET AL.*, 13 Allen (Mass.), 58 (1866), tort to recover damages for a personal injury received in consequence of the neglect of the defendants' servant, in driving against the plaintiff, it appeared that while plaintiff was walking in a highway a wagon was driven against him by a boy named Wheeler; that Wheeler was employed by the defendants, Cobb & Atwood, who were dealers in fish, and the wagon had just left their place of business loaded with their fish. Wheeler was driving for a truckman who was sick. *Held*, that the person in charge of the horse and wagon at the time of the injury to plaintiff was not in the employ or service of defendants, but was acting as the servant of a third person, who exercised an independent employment in no way subject to the command or control of the defendants as to the mode in which it should be carried on. No liability attached to the defendants. Citing *Brackett v. Lubke*, 4 Allen, 138; *Forsyth v. Hooper*, 11 Allen, 419, 421. Plaintiff's exceptions overruled.

Person injured by horse and wagon driven by hirer of team — Owner not liable.

In *HERLIHY v. SMITH AND ANOTHER*, 116 Mass. 265 (November, 1874), where plaintiff while engaged in paving a street railroad track was run over by defendants' horse and wagon, which was being driven by a minor to whom the team had been lent, plaintiff's exceptions to verdict directed for defendants were overruled, the defendants, the owners, not being liable for the injury caused by the negligent act of the person using such vehicle, in the use of which the defendants had no interest.

*City laborer in trench injured by negligent act of defendant's teamster—
Defendant liable.*

In *REAGAN v. CASEY*, 160 Mass. 374 (January, 1894), city laborer at work in a trench injured by the negligent act of a teamster in defendant's employ backing up against the plaintiff, hitting his back, pushing him against a post, and injuring him, the defendant was held liable and exceptions to verdict rendered for plaintiff were overruled.

Contractor liable for injury resulting from negligent act of driver of his horse and wagon.

In *HUFF v. FORD*, 126 Mass. 24 (1878), it was held that the driver of a horse and wagon, employed and paid by a contractor, and who had the entire management of the same as to manner of driving and having the horses shod, was the servant of said contractor, and for the negligence of the driver in these respects, resulting in injury to a third person the said contractor was liable.

Collision on highway—Liability for negligent act of servant.

In *YOUNG v. SOUTH BOSTON ICE CO.*, 150 Mass. 527 (January, 1890), tort for personal injuries sustained by plaintiff while driving in a highway in collision with an ice cart of defendant, defendant's exceptions to verdict for plaintiff were overruled, KNOWLTON, J., stating the case as follows: "The defendant's servant was employed to drive an ice cart along the streets for the purpose of delivering ice to the defendant's customers. The question presented by this bill of exceptions is whether the facts set out in the request for instructions, if found by the jury to be true, would have precluded them from also finding that at the time of the collision the defendant's servant was acting within the general scope of his employment. If he was so acting, the defendant is liable for his act, even though it may have been wilful. *Howe v. Newmarch*, 12 Allen, 49; *Holmes v. Wakefield*, 12 Allen, 580; *Ramsden v. Boston & Albany R. R.*, 104 Mass. 117. If all the facts were proved according to the assumption in the defendant's request, we think they were not necessarily inconsistent with the plaintiff's theory. Upon the question raised, the jury might consider all the evidence, and it was competent for them to find that, at the time of the collision, the driver drove against the plaintiff's carriage in trying to do the defendant's business, and that he was acting within the general scope of his employment."

Boy kicked by colt—Servant's invitation to ride—Scope of employment.

In *BOWLER v. O'CONNELL AND ANOTHER*, 162 Mass. 319 (October, 1894), where a boy, between five and six years of age, was kicked by a colt belonging to defendants, exceptions to verdict for plaintiff were sustained. ALLEN, J., said: "In determining the legal question which is presented we must assume that the jury adopted the plaintiff's view as to the circumstances attending the accident, and the testimony in contradiction thereof may be disregarded. With reference to this aspect of the case, the defendants asked an instruction to the jury that they were not responsible for the acts of Frank O'Connell, who was thirteen years of age and the son of one of the defendants, in his

invitation to the plaintiff to take a ride upon the colt. The jury, however, were instructed that, if Frank O'Connell was the servant of the defendants in leading the colt from the stable to the defendant's yard, and while so leading the colt the plaintiff, who was between five and six years of age, was invited by Frank to ride, and was injured as he was going forward to accept the invitation, it would be competent for the jury to find that such invitation was within the scope of the employment of Frank; and again, that if, while Frank was leading the colt along or across the sidewalk or in the yard of the defendants, as the servant of the defendants, and, while so leading the colt in the line of his duty, he of his own accord, and without the knowledge or authority or of direction from the defendants, invited the plaintiff to ride upon the horse, and while the plaintiff was attempting to go forward to accept the invitation of Frank he was injured, it was competent for the jury to find the action of Frank to be negligent, and such negligence to be within the scope of his employment." * * * *Held*, that it was not competent for the jury to find that Frank acted within the scope of his employment.

Invitation to infant to ride — Scope of authority.

In *DRISCOLL v. SCANLON*, 165 Mass. 348 (February, 1896), the case is stated in the syllabus to the official report as follows: "If a driver of a cart invites an infant to drive with him, either for pleasure or to take his place in driving while he sleeps, and the infant falls from the cart and is run over by it, the act is outside the driver's authority and his master is not liable to the infant." Opinion by HOLMES, J.

Woman injured in fireworks celebration — Contractor liable for act of servant.

COLVIN v. PEABODY AND ANOTHER, 155 Mass. 104 (November, 1891), was an action of tort against Peabody and Wedger for personal injuries to plaintiff, a woman, alleged to have been caused by being struck by a bomb or a fragment of a bomb, in a fireworks display for a city celebration. Peabody contracted to furnish the fireworks and hired Wedger and another to fire the display for him. At the trial a verdict was ordered for the defendant Wedger, but a verdict was returned against Peabody, to which he alleged exceptions. The Supreme Court sustained the verdict, holding that Peabody was responsible for the negligence of the persons engaged by him to fire the display.

Negligent act of servant setting fire to premises — Master liable.

In *PERRY v. SMITH*, 156 Mass. 340 (May, 1892), tort, for carelessly and negligently setting fire to plaintiff's premises, defendant's exceptions were overruled, the syllabus to the official report stating the case as follows: "In an action for negligently setting fire to the plaintiff's premises, there was evidence that a workman who was sent by the defendant, a plumber, to make repairs to the plaintiff's shop, took a lamp into a shafting box to mend the pipe, knowing that the box was soaked with oil. *Held*, that the judge was warranted in finding that a plumber who knew his business would not set fire to the box unless he was careless, and that, on the other hand, the plaintiff was warranted in assuming that the condition of the box was obvious, and would be noticed by the workman, and that the workman was aware that oil is easily ignited by flame." Opinion by HOLMES, J.

Master liable for assault committed by servant.

In *LEVI v. BROOKS ET AL.*, 121 Mass. 501 (January, 1877), two actions of tort in each of which it was alleged that "the defendants by themselves, or their servants acting under their orders, with force and arms, did an assault make upon the body of the plaintiff," defendants' exceptions to verdicts rendered for plaintiff in the Superior Court were overruled, it being held (as per syllabus to official report) that "a master who orders his servants to go to the house of a person named and remove certain furniture, if a sum due the master thereon is not paid, is liable for a wilful assault committed by the servants, if done in the execution of the order, and not for some private end or advantage of the servants." [Citing and following *Howe v. Newmarch*, 12 Allen, 49; *Barden v. Felch*, 109 Mass. 154; *Hawes v. Knowles*, 114 Mass. 518.]

Employee of firm of lumber dealers caught between freight cars—Act of defendant's servants in backing the cars—Railroad not liable.

In *BURNS v. BOSTON & LOWELL R. R. Co.*, 101 Mass. 50, the bill of exceptions states the case as follows: "At the trial the plaintiff offered evidence tending to show that the defendants had a side railroad track at Lowell, built and used by them for the purpose of transporting merchandise to and from a wharf or landing of the defendants adjacent thereto; that merchandise cars were switched off from the main track to this side-track for the purpose of being loaded by the owners with merchandise of various owners to be transported by the defendants; and that, at the time of the occurrence complained of, the defendants had upon this side-track an engine and a number of cars, one of which cars was to be loaded with lumber by Norcross & Company, lumber dealers, who had a contract with the defendants for the transportation of said lumber. The plaintiff testified that he was employed by an agent of Norcross & Company to assist in placing the car intended for them opposite their lumber, placed on the wharf for transportation, and in loading the same with lumber; that he uncoupled this car from the one before it and pushed it down some five or six feet to a proper place for loading it; that he did not know that any engine was on the side-track; that just as he had pushed the car into this position, the defendants' servants backed the engine and the other cars upon him and caused the injury; that he went between the cars to uncouple them, and pushed the car down by the end, walking behind it on the track; and that, at the time of the collision and injury, he was back of the bunter of the car he had pushed down, and was jammed between the bunters of the two cars. Upon this evidence the court, being of opinion that the plaintiff was not in the exercise of due care, directed the jury to return a verdict for the defendants," which was done; and the plaintiff alleged exceptions. The Supreme Court overruled the exceptions.

Employee of contractor run over by defendant's engine—Question for jury.

In *GOODFELLOW v. BOSTON, HARTFORD & ERIE R. R. Co.*, 106 Mass. 461, workman in employ of contractor run over by defendant's engine on a side-track, plaintiff's exceptions to verdict directed for defendant were sustained, it being held that the case should have been submitted to the jury. The Supreme Court (per GRAY, J.) said:

"It appears by the bill of exceptions that the plaintiff and other workmen employed by a contractor who, under agreement with the defendants, was constructing a wall to support their railroad, were engaged in holding a rope attached to a derrick in actual use for moving stones for that purpose; that the work required the derrick and rope to be in the position in which they were, and the plaintiff and his comrades to be upon the side-track of the railroad; that while they were there, busily at work, and while the safety of all required their most careful attention to their duty, a locomotive engine, attached to a train of cars which had just passed over the side-track to the main track of the railroad, was separated from the train, and, without any bell rung or signal given, run back upon the side-track, and there struck and injured the plaintiff; and that he knew and relied on the custom of the defendants to ring the bell or sound the whistle whenever one of their engines approached men working upon the railroad. These facts, if not varied or disproved, would have warranted the jury in finding that the plaintiff was rightfully where he was, and was not in fault in being engrossed in his work and unaware of the approach of the engine until it was too late to avoid it. *Quirk v. Holt*, 99 Mass. 164; *Hackett v. Middlesex Manufacturing Co.*, 101 Mass. 101, 15 Am. Neg. Cas. 526, *ante*; *Mayo v. Boston & Maine Railroad*, 104 Mass. 137, 3 Am. Neg. Cas. 773; *Wheelock v. Boston & Albany Railroad Co.*, 105 Mass. 203, 9 Am. Neg. Cas. 439^m.

"In *Burns v. Boston & Lowell R. R. Co.*, 101 Mass. 51 [preceding paragraph], the ground upon which the plaintiff was held not to be entitled to recover was that the circumstances of that case did not show that he was rightfully upon the side-track of the railroad. And the remark quoted by the defendants from *Quirk v. Holt*, 99 Mass. 166, in which a man sustained an action for being struck by a wagon while at work in the highway, that 'his duty to keep watch for the defendant's approach was not the same as if he had been at work upon a railroad when the defendant was coming with a locomotive,' does not warrant the inference that in such a case as the present he must be held wanting in due care." * * *

Circus employee injured by derailment of circus car — Defendant not liable.

In *ROBERTSON v. OLD COLONY R. R. Co.*, 156 Mass. 525 (June, 1892), judgment was rendered on the verdict for defendant, the syllabus to the official report stating the case as follows: "A railroad company agreed to haul certain cars of the proprietors of a circus according to a certain schedule of time, and for a price less than the regular rates for such service, the proprietors agreeing at their own expense to load and unload the cars, to save the defendant harmless from all claims for damages to persons and property, however accruing, and to 'assume all risk of accident from any cause.' An accident occurred by one of the cars running off the track by reason of its trucks not being in proper condition, and an employee of the proprietors who was riding in one of the cars was injured. *Held*, in an action for the injuries by the employee against the company, that he could not recover, as the defendant had no control over the condition of the cars and no power to interfere with them, as the contract was simply to haul the cars as they were, which contract the defendant had a right to make, and as it was under no obligation to draw the cars as a common carrier." Opinion by LATHROP, J.

HECTOR v. BOSTON ELECTRIC LIGHT CO.

Supreme Judicial Court, Massachusetts, June, 1894.

[Reported in 161 Mass. 558.]

LINEMAN STRINGING TELEPHONE WIRES ON ROOF OF BUILDING INJURED BY CONTACT WITH WIRE OF ELECTRIC LIGHT COMPANY—INSULATION—ABSENCE OF DUE CARE—LICENSEE—STATUTE—DEFENDANT NOT LIABLE.—Where a lineman in the employ of a telegraph and telephone company went upon the roof of a building in broad daylight to string a telephone wire for his company and, while stooping down to look from the roof to see how he could get down upon the roof of another building, he felt a current of electricity go through him, and was found lying unconscious under a group of wires belonging to defendant, an electric light company, his fingers and head being burned, and it was shown that plaintiff had touched the wire, the insulation of which had worn off, it was *held* that defendant owed no duty to the plaintiff to have its wires properly insulated at the place of injury, or to have them so far above the roof of the building that plaintiff would not come in contact with them. *Held*, also, that whatever might be the duty of the defendant to the owner of the building, on the roof of which the accident happened, as to stringing its wires, there was no evidence that defendant authorized the use of that roof by the plaintiff's company, or had any right to permit that company's servants to go upon it (1).

TORT, for personal injuries occasioned to the plaintiff from contact with a wire through which an alternating electric current was being transmitted.

The first count of the declaration alleged that the defendant was a corporation engaged in the business of furnishing artificial light and power by means of electricity, and that for the

1. See, also, *ILLINGSWORTH v. BOSTON ELECTRIC LIGHT CO.*, 161 Mass. 583 (June, 1894), tort, for personal injuries resulting from contact with a wire charged with electricity, where it appeared that plaintiff, at the time of the accident, was a lineman in the fire department of the city of Boston, and that acting under orders of the foreman of his department and in the course of his duties, he ascended an upright frame structure owned by defendant upon the roof of a building owned by a third person, to attend to

the wires of the fire department, and in descending he touched a charged wire and received a shock which threw him to the roof, his hands being severely burned, and his head injured by the fall. A verdict was directed for defendant and plaintiff alleged exceptions.

FIELD, CH. J., said: "The exceptions recite that the court ruled that there was no evidence for the jury, and ordered a verdict for the defendant. The questions argued relate to the liability of the defendant on the

purpose of transmission and distribution of the same it maintained lines of wire attached for their support to standards, posts, or poles erected upon buildings; that on March 10, 1890, such a wire was strung by the defendant over a building numbered 41 on Temple place in the city of Boston, through which alternating electrical currents were being transmitted; that the currents were of such force as to be dangerous to human life and health if the wire should come in contact with the human body; and that the defendant negligently permitted the wire to be suspended in such a position and at such a distance from the roof that the plaintiff, while in the discharge of his duty as a lineman of the New England Telegraph and Telephone Company, upon the roof of the building No. 41 Temple place, and while in the exercise of due care, was injured by contact with it.

The second and third counts were similar to the first, except that they alleged the accident to have occurred by reason of the defective insulation of the wire at the point where the plaintiff came in contact with it; and by the third count the plaintiff claimed damages for his injuries under the provisions of Pub. Sts. c. 109, § 12, and St. 1883, c. 221. Answer, a general denial.

The defendant also demurred to the declaration, assigning as grounds therefor, in substance, that the declaration did not contain averments of fact sufficient to create a duty on the part of the defendant towards the plaintiff, or to impose upon it any statutory liability.

The Superior Court (Suffolk) overruled the demurrer; and the defendant appealed to this court.

The case was then tried in the Superior Court, before Dewey, J., and the jury returned a verdict for the plaintiff. The defendant alleged exceptions, the nature of which appears in the opinion. *Exceptions sustained.*

E. W. BURDETT & C. A. SNOW, for defendant.

S. L. WHIPPLE & W. M. NOBLE, for plaintiff.

Field, Ch. J. — The exceptions in this case as amended were

evidence. under Pub Stats., c. 109, § 12, and Stat. 1883, c. 221; under Stat. 1890, c. 404, section 1; and at common law. There is no evidence of any liability under Pub. Stats., c. 109, section 12, and Stat. 1883, c. 221." The court, in reviewing the case, said that the questions of defendant's negligence and of plaintiff's due care were for the jury, and plaintiff's exceptions were *sustained*.

* * * As to the Stat. 1890, c. 404, section 1, there was no evidence of any defective insulation of the wires. See Note on Electric Wire Accidents in which Employees were injured, 8 AM. NEG. REP. 218-221.

allowed by the presiding justice of the Superior Court, if it was within his authority and discretion to allow them, otherwise they were disallowed. The original draft of the exceptions was filed on February 20, 1892, within the time allowed. In April following the counsel of both parties were heard upon the allowance of the exceptions. The plaintiff's counsel then asked if they be disallowed, which the justice at that time declined to do, but he suggested that the counsel confer together, and that the plaintiff's counsel point out what changes they thought should be made. This was done, and the draft of the exceptions was altered, and some things added to it with the consent of the counsel of the defendant, who, however, did not admit that all such alterations and additions were necessary. The plaintiff's counsel did not waive their objections to the allowance of the amended draft, but contended that it was substantially a new bill of exceptions, made up and filed after the time prescribed by the statute for filing exceptions had passed. Copies of the exceptions have been furnished us, showing the difference between the bill as originally filed and the bill as amended.

The excepting party has a right, if he chooses, to stand upon his exceptions as originally filed, and to prove the truth of them if they are not allowed. The extent to which errors in such exceptions can be corrected on a petition to prove the exceptions was considered in *Morse v. Woodworth*, 155 Mass. 233. The extent to which the presiding justice can allow the excepting party to amend his bill of exceptions has not been determined. In such a case as this, where many questions of law were raised at the trial, one of which was that upon all the evidence the plaintiff could not recover, it is hardly possible that the original draft of the exceptions, without any change, would be entirely acceptable to either the presiding justice or to the other party. The other party under the statute has a right to be heard upon the allowance of the exceptions, and the practice has been to permit the excepting party, if he chooses, with the consent of the presiding justice, to amend his exceptions so as to state more accurately and completely the questions of law which were raised at the trial and included in the bill of exceptions as filed. It is true that the presiding justice is not required by law to allow any such amendments, but his power to allow amendments is undoubted. *Perry v. Breed*, 117 Mass. 155. They can not be allowed without the

consent of the excepting party, but with his consent they can be, certainly so far as is necessary to make the exceptions conformable to the truth and the whole truth with reference to the questions of law raised at the trial and included in the original bill of exceptions.

We have no occasion to consider in this case whether a distinct exception taken at the trial and omitted from the bill as filed by accident or mistake can be added by an amendment to the original draft after the time has expired for filing exceptions. In the present bill we think that the amendments allowed by the presiding justice, with the consent of the defendant, were such as were within his power and discretion to allow.

The plaintiff was a lineman of the New England Telegraph and Telephone Company, and went upon the roof of the building No. 41 Temple place, Boston, called the Youth's Companion building, for the purpose of affixing a telephone wire to a standard erected upon the roof of the building No. 45 Temple place, which adjoined No. 41 on the side towards Washington street. It was intended that this wire should run from West street to this standard, and thence should swerve slightly towards Washington street and pass across Temple place. He was injured while on the roof of No. 41 by his left hand coming in contact with a wire belonging to the defendant, through which an alternating electric light current was being transmitted. This electric light wire ran over the southeasterly corner of the building on which he was, and at the point where the plaintiff's hand came in contact with it was about twenty-five feet from the corner. The wire formed one side of an alternating electric light circuit, the other wire of the circuit running parallel with it and at a distance of seventeen and a half inches from it. No wires of any kind were attached to the roof of No. 41 Temple place, and the roof was clean, smooth, and unobstructed by anything except a scuttle near the back part of it, a skylight near where the plaintiff fell, and two or three other skylights near the rear of the roof. The roof of the building No. 45 Temple place was about twenty feet below the roof of the building No. 41, and each was a flat, or nearly flat roof. Near the center of the roof of No. 45 the defendant, which is a corporation engaged in the business of furnishing electric light and power in the city of Boston, had erected a standard about twenty-five feet in height, on which were three cross-arms running horizontally and at right angles with the line

of Temple place. This standard was used for the purpose of supporting various wires which were attached to it, and ran from it to two other fixtures on the other side of Temple place. The highest cross-arm was about five feet long and had on it four glass insulators placed seventeen inches and one-half apart, attached to which were four arc electric light wires. The next lower cross-arm was placed two feet below this, was about eight feet in length, and had upon it six insulators, placed at the same distance apart, to which were attached electric light wires. The two insulators next to the upright post, one on each side, had attached to them the two alternating electric light wires, and the remainder of the insulators had attached to them four arc electric wires. The lowest cross-arm was placed about one foot and one-half below the middle cross-arm, was about twelve feet in length, and had on it ten insulators, placed twelve inches apart, to which were attached ten wires not electric light wires, of which at least six were telephone wires. All the wires attached to this standard ran northeasterly across Temple place, above the southeast corner of the roof of No. 41, to two fixtures on the other side of Temple place, on the buildings Nos. 24 and 34. All the arc electric light wires ran to a standard on No. 24, and the two alternating electric wires on the middle cross-arm, and the telephone and other wires on the lowest cross-arm, ran to a standard on No. 34. The wires thus starting from the same standard on No. 45, as they crossed over the corner of the roof of No. 41, diverged and formed two distinct groups of wires, which for convenience are called the first and second groups, the wires running to No. 24 constituting the first group, and those running to No. 34 the second group. The point at which the second group of wires crossed the side of the roof of No. 41, next to No. 45, was distant from the southeast corner of the roof of No. 45 about fifteen feet, and the point where the first group crossed this side was distant from the same corner about twenty feet, so that there was a distance of about five feet between the two groups on the side of the roof of No. 41, next to No. 45. Between the place where these groups of wires crossed the side of the roof of No. 41, next to No. 45, and the rear of the roof of No. 41 there was a distance of about seventy feet, and there was no obstruction of any kind on this part of the roof except two chimneys, each four feet in width, nor was there any wire, and any one might have gone on any portion

of that part of the roof and looked down upon the roof of No. 45 without encountering any danger. The first group of wires, as they crossed above the corner of the roof of No. 41, were at distances varying from four to six feet above the roof, the two alternating electric light wires, which were in the second group, were at a distance of about two feet and a half above the roof, and the telephone and other wires running from the lowest arm of the fixture on No. 45 were about one foot below the alternating electric light wires.

The plaintiff, at the time of the accident, was at work with others for the Telegraph and Telephone Company in stringing a telephone wire from the top of a building in West street to the standard on No. 45 Temple place, and thence to a fixture on the top of a building on the other side of Temple place. He was told by the foreman to go upon the building No. 45 Temple place and attach this wire to the standard there. He went up through the building No. 29 Temple place, called the Warren building, and out upon the roof of that building, thence across the intervening roofs to the roof of No. 41. There were no steps or other means provided for getting from the roof of No. 41 to the roof of No. 45, and there was no ladder or rope on the roof which could be used for this purpose. There was access to the roof of No. 41 through the building No. 41, and also access to the roof of No. 45 through the building No. 45. The plaintiff, after getting upon the roof of No. 41, and after calling to a fellow-workman in the street to come up on the roof of No. 45, went to look over the side of the roof of No. 41 to see how he could get down upon the roof of No. 45. He was looking over the side of the roof on to the roof of No. 45, and was stooping down — he had to stoop down to clear a large bunch of the wires — when he felt a current of electricity go through him, and he remembered nothing more. The plaintiff was found lying under the first group of wires, with four of his fingers burnt and a wound upon the side of his head where the hair was burnt off. The nearer of the two alternating electric light wires, as one approached them in going towards the side of the roof, had upon it some pieces of burnt flesh, which showed where the plaintiff had touched the wire, and the insulation of the wire where it appeared that the plaintiff had touched it was worn off. The plaintiff had had a long experience with electrical apparatus, — was familiar with all kinds of electrical wires and the proper methods of

handling them, and the dangers attendant upon the business. He testified "that he knew the general character of the structures used by the various companies in the prosecution of their business in Boston; that the Boston Electric Light Company has a structure of a peculiar color of its own, and that the fact last referred to was common knowledge among all linemen; that the Telephone Company had structures of a different color from that of the Boston Electric Light Company; that the colors of the structures used by the other companies in Boston also differed from the color of the structures of the Boston Electric Light Company; that linemen, if they were close enough to see the color of the structure, could easily tell whether it belonged to one company or another; that in the prosecution of his work as a lineman he had occasion in Boston to go on to roofs which were crossed by all sorts of wires, and to go upon structures which had all sorts of wires; that on the structure on 45 Temple place he would not have been surprised to find there electric light, telephone, telegraph, police signal, and other wires; that telephone wires were sometimes insulated and sometimes not insulated."

It appears that the alternating electric light wires did not resemble any wires used by other companies, except the police signal wires. The plaintiff testified in substance that he noticed the big bunch of wires, by which he must have meant the first group, but that he did not recollect noticing the others. All he remembered was that there was a big body of wires, and that he had to stoop in order to clear them, but he cleared them, and went to the edge of the roof and looked down; that he could not say whether there were any wires on his left or not; that he noticed that there were different kinds of wires on the roof after he got on to it; that the only safe rule to follow was to treat every wire as dangerous; that he was very careful not to touch any wire on a roof, because he was liable to get a shock; that even telegraph or telephone wires sometimes get across wires having a dangerous current and become dangerous; and that the roof on which he was standing was a copper roof, which was a conductor and made what is called a "ground." It was admitted that the defendant was transmitting through these alternating wires an electric current of one thousand volts, which was dangerous under certain conditions; but it was contended that, to make such a current dangerous, the person touching a wire must be "grounded," as it is called,

that is, be connected with the earth by substances that are conductors of electricity, while the other wire of the circuit must be grounded at the same time.

The accident happened in the morning of March 10, 1890, when it was broad daylight. The jury found, in answer to a question submitted to them, that the plaintiff at the time of the injury was upon the roof of No. 41 Temple place by the implied permission or license of a person having authority to grant such permission or license. The presiding justice ruled that the plaintiff could not under his declaration "claim that the defendant was unlawfully or without right maintaining the alternating wires in the position in which they were at the time of the accident, reserving, however, to the plaintiff the right to claim that the defendant negligently maintained said wires in such position." He also ruled "that there was no evidence of any invitation, express or implied," held out to the plaintiff by the owners of the building No. 41, and no evidence of any preparation or adaptation of the building by the owners for the plaintiff's use; and that, "if the plaintiff was a mere licensee the defendant, if liable at all, was not liable for mere omission on its part to exercise reasonable care as to the position or condition of the wire which caused the plaintiff's injury, but would be liable only for acts of commission, and refused to rule that there was no evidence of any such act of commission." He also ruled "that a mere licensee going upon another man's land must take the premises as he finds them, subject to all their concomitant conditions and perils; and that, if the plaintiff was a mere licensee, in order to recover he must show some change or alteration in the condition of the premises or wire thereon whereby injury may arise to persons being upon the roof in question, that such change or alteration occurred during the existence of the license in question, and that the plaintiff had no notice of such change or alteration." He also ruled that, if the plaintiff was on the roof of the building No. 41 as a trespasser, upon the evidence in this case he would not be entitled to recover. If the plaintiff was a licensee, he stated the law as follows: "The law is, that as between a licensee and the owner of the premises, where as against the owner of the premises he is a mere licensee, he has to take the premises in the condition in which he finds them. He occupies them as a licensee — pure licensee — at his own risk, unless, perhaps, in the case of some concealed trap. Now, the defendant claims

that at most he was only a licensee, if he was that, and it claims that this same doctrine which applies as between the licensee and the owner of the premises applied between the plaintiff and it as the owner and maintainer of these electric lights, — that is what it claims. And so it says there was no duty from it to the plaintiff. Now the plaintiff claims something more. He claims that there was more than that; that whatever might be his relation to the owners of the Youth's Companion building, yet that he was on that building by the permission of the owners, so that he was not a trespasser, was not there unlawfully, and that then, as between him and the defendant a new element enters; the plaintiff claims that the defendant placed the electric light wires on the building in Temple place, where they were when the plaintiff was injured, and had full control of them at that time, that is, the defendant had full control of them at that time; that through some of these wires thus placed there passed in their ordinary and daily use alternating currents of electricity, which, under such conditions as were liable to happen and might reasonably be expected to occur, became dangerous to human life and safety; that this was known, or reasonably ought to have been known, to the defendant and its servants, who put up and had charge of the wires; that there were also telegraph wires and telephone wires, with the defendant's knowledge and express or implied consent, attached to the same standard to which the wires of the defendant were attached, and at this place ran near the defendant's wires; and that the defendant and its servants knew, or with the exercise of ordinary prudence and attention would have known, that the servants of the telegraph and telephone companies, whose wires were attached as aforesaid, would, in the usual course of their duty and employment, have occasion to come to said standard and in close proximity with the defendant's said wires, and that the natural and probable consequence might be that unless the defendant used due and proper care in respect to its said wires, the said servants of the said telephone and telegraph companies, while in the usual course of their employment and duty as aforesaid, and though in the use of due care themselves, might be injured by said wires and the electric current thereof. That is what the plaintiff claims. And what is the result? If the plaintiff satisfies you that these claims are well founded, and that the plaintiff at the time and place of his injury was a servant of the telephone company, was lawfully on said build-

ing, and then and there rightfully acting in the course of his employment, and where the defendant ought reasonably to have anticipated he might be, then the defendant owed him some duty in regard to its said wires." That duty the presiding justice afterwards defined as "the duty to use reasonable and ordinary care in respect to the condition of these wires and the location of them. * * * The defendant must use reasonable and proper care in the kind of wire it uses, in the care it takes of it while in use, and in regard to the location in which it maintains it."

Under this statement of the law, the claim of the plaintiff was in effect that the alternating electric light wires were not properly insulated; that at the particular place where the plaintiff touched one of them the insulation had been carelessly allowed to be worn off; and that the wires were placed in a position so near to the roof that a person on the roof would naturally come in contact with them. The jury must have found that there was a license or permission given by the defendant to the Telegraph and Telephone Company to attach its wires to its standard on the building No. 45 Temple place. The principal questions argued are, whether the defendant owed the Telegraph and Telephone Company and its servants any duty in regard to the proper insulation or position of its wires at the place where the wires ran over the roof of the building No. 41, and if it did, whether the plaintiff in going to the side of the roof as he did to look down upon the roof of No. 45 for the purpose of finding out how he could get down upon it, was in the exercise of due care.

The first prayer of the defendant for instructions raises the question whether, upon all the evidence, the plaintiff can recover. We doubt if the plaintiff offered sufficient evidence that he was in the exercise of due care at the time and place of the accident. It was daylight, the wires were visible, and the plaintiff knew that some of the wires might be dangerous. If we assume that as against the owner of the building No. 41 he was rightfully on the roof of that building for the purpose of going down upon the roof of the building No. 45, there was on the side of the roof a long distance unobstructed over which he could have looked down with safety. The plaintiff could look down upon the roof of No. 45 in his own way, and the safe place to do this was obvious. Instead of selecting a safe place, he unnecessarily stooped under some wires which he saw and

knew might be dangerous, without noticing another set of wires lower down which were in plain sight. In consequence of this conduct his hand accidentally came in contact with one of the alternating electric light wires at a point where the insulation was worn off, and he received his injury. If necessary to the decision, it would certainly deserve consideration whether this conduct does not show an unnecessary exposure to a danger which the plaintiff knew, or ought to have known. See *Lothrop v. Fitchburg R. R. Co.*, 150 Mass. 423, 15 Am. Neg. Cas. 465, *ante*. Without determining this question, however, we are of opinion that the defendant, on the evidence, owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injury, or to have its wires at that place supported so far above the roof of the building No. 41 that the plaintiff would not come in contact with them when on that roof. On the evidence recited in the exceptions, the most favorable inference for the plaintiff is that the Telegraph and Telephone Company was permitted by the defendant to use its standard on the building No. 45 Temple place, and that, therefore, the plaintiff, as the servant of the Telegraph and Telephone Company, engaged in its business, had an implied license from the defendant to go upon the roof of this building and attach telegraph and telephone wires to its standard. Whatever may be the duty of the defendant toward its licensees, it must be confined, we think, to licensees when acting within the scope of the license, and the defendant had no reasonable ground to expect that the servants of the Telegraph and Telephone Company would approach this standard in the way used by the plaintiff. If the presumption is that the defendant maintained this standard on the roof of the building No. 45 by contract with or permission of the owner of that building, the inference would be that it had a license from the owner to go through his building upon the roof for the purpose of reaching the standard and attaching wires to it, and this license might be available to the servants of other companies which were permitted to use the standard, if the standard was erected or maintained by the defendant for the use of other companies as well as of itself. *Doty v. Gorham*, 5 Pick. 487. This was the most direct way of reaching the roof of No. 45, and was the way provided by the owner of the building for reaching the roof, and there was nothing in the situation of this and the adjoining buildings indicating that the roof of

building No. 41 was to be used for the purpose of reaching the roof on No. 45. The right to go upon the roof of No. 41 for this purpose could only be derived from the owner or occupant of that building. Whatever may be the duty of the defendant in stringing its wires over the roof of No. 41 to the owner of that building and his servants, we see no evidence that the defendant intended to authorize the use of this roof by the Telegraph and Telephone Company, or had any right to permit the servants of that company to go upon it. Whatever duty on the evidence the defendant owed to the plaintiff as servant of the Telegraph and Telephone Company, under its license to that company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the defendant's wires, and the defendant was not required, for the protection of the servants of the Telegraph and Telephone Company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, at places where the defendant had no reason to expect that the servants of that company would go in the performance of their duties in using its standard, and where the defendant had neither invited nor licensed them to go.

The first two counts of the declaration are at common law; the third count is under Pub. Sts. c. 109, § 12, and St. 1883, c. 221. The court required the plaintiff to elect whether he would rely upon the first and second counts, or upon the third, and he elected to rely upon the first and second. As the exceptions must be sustained, and there may be a new trial, it is proper to notice the contention of the plaintiff under the third count, as in the event of another trial the plaintiff may rely upon that count. The Pub. Sts. c. 109, § 12, provide that "when an injury is done to a person or to property by the posts, wires, or other apparatus of a telegraphic line, the company shall be responsible in damages to the party injured," etc. St. 1883, c. 221, is as follows: "All provisions of law granting to persons and corporations authority to erect, lay, and maintain, and to cities and towns authority to regulate, telegraph and telephone lines, except sections sixteen and eighteen of chapter one hundred and nine of the Public Statutes, shall, so far as applicable, apply to lines for the transmission of electricity for the purpose of lighting." This last statute relates solely to the authority to erect, lay, and maintain lines for the transmission of electricity for the purpose of lighting, and to the

regulation of such lines; it does not relate to the liability of electric light companies for injuries received by any person from the posts, wires, or other apparatus of such companies. This renders it unnecessary to consider whether section 12 of Pub. Sts., c. 109, was intended to include injuries received from an electric current transmitted through wires. It has been argued that this could not have been intended by this section, as telegraph currents are not dangerous.

In the view we have taken of this case, the questions arising on the demurrer need not be determined.

Exceptions sustained.

GRIFFIN v. OVERMAN WHEEL COMPANY.⁽¹⁾

Error to the Circuit Court of the United States for the District of Massachusetts; April, 1894.

[Reported in 21 U. S. App. 151.]

MOTION — OBJECTION — PRACTICE — FEDERAL COURTS.—The practice in the Federal courts is thoroughly settled that when one party makes a motion or interposes an objection on grounds specifically stated, he can not at a subsequent stage of the case shift or enlarge his position, unless, perhaps, when it clearly appears that by so doing no detriment could come to the other party. Therefore, the party so moving or objecting is ordinarily required to put his finger on the very pith and marrow of what he claims, and is ordinarily held to waive everything except what is so pointed out.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT—EMPLOYEE INJURED—QUESTION OF DUE CARE—ERRONEOUS CHARGE — CONTRIBUTORY NEGLIGENCE.—Where an action was brought by a plaintiff against a corporation, under the Massachusetts Employers' Liability Act (Stat. 1887, c. 270), to recover damages for the death of her husband, one of the employees of said corporation, caused by the alleged negligence of the corporation, and there was evidence that deceased was in the exercise of due care, it was error for the trial court to charge that deceased was not in the exercise of due care, and to direct verdict for defendant, and judgment was reversed.

WEBB, DISTRICT JUDGE, concurred in separate opinion and discussed the rule of contributory negligence, and also the Employers' Liability Act of Massachusetts (2).

1. The Griffin case is reported in this volume because of the Federal discussion of the Massachusetts Employers' Liability Act and its citation of several Massachusetts cases re-

ported in this volume of Am. Neg. Cas.

2. See the Massachusetts Employers' Liability Act (Statute of 1887.

"THIS was an action originally brought in the Superior Court of Massachusetts in and for the county of Hampden, under the Employers' Liability Act (Acts and Resolves of Massachusetts of 1887, c. 270), by Mary Griffin, a citizen of Massachusetts, against the Overman Wheel Company, a Connecticut corporation, to recover damages for the death of John Griffin, her husband, who had been an employee of said corporation, alleging in her declaration that his death had been caused by reason of its negligence. The cause having been removed to the Circuit Court of the United States for the District of Massachusetts, on the defendant's petition, the parties thereto being citizens of different States, the defendant answered denying the allegations contained in the plaintiff's declaration, and, among other things, alleging that the negligence of the deceased contributed to his death, and that it was not responsible therefor nor liable to respond therefor in damages. On the trial, at the conclusion of the plaintiff's testimony, the court, on motion of the defendant, directed a verdict in its favor, and the plaintiff sued out a writ of error from the judgment which was entered thereupon. Further facts appear in the opinion." *Judgment reversed.*

MR. JAMES B. CARROLL and MR. JAMES E. COTTER, for plaintiff in error.

MR. LUTHER WHITE and MR. EDWARD S. WHITE, for defendant in error.

Before PUTNAM, CIRCUIT JUDGE, and NELSON and WEBB, DISTRICT JUDGES.

Putnam, Circuit Judge, delivered the opinion of the court. — When the defendant in the court below moved that a verdict be directed in its favor, it was put in the following form, as appears by the record: "The defendant offered no testimony, and at the conclusion of the plaintiff's testimony asked the court to rule 'that there was no evidence that the said John Griffin was in the exercise of due care.'" John Griffin was the person on account of whose death the action was commenced. The record then proceeds: "The judge so ruled and ordered a verdict for the defendant, and thereupon a verdict was so returned. To which ruling and order the plaintiff excepts, and she prays that her exceptions may be allowed."

c. 270), set out with similar statutes appears on pages 861-863 of that of other States, in 13 AM. NEG. CAS volume. 857-874. The Massachusetts statute

By the form of the defendant's request for this ruling it limited itself, for all the purposes of this appeal, to the precise proposition stated by it. The practice in the Federal courts is thoroughly settled that when one party makes a motion or interposes an objection on grounds specifically stated, he cannot at a subsequent stage of the case shift or enlarge his position, unless, perhaps, when it clearly appears that by so doing no detriment could come to the other party. Therefore the party so moving or objecting is ordinarily required to put his finger on the very pith and marrow of what he claims, and is ordinarily held to waive everything except what is so pointed out. *Non constat* that if the defendant had expressed its motion generally, or if it had been expressed specifically with other reasons than those which were stated, the plaintiff might, with the leave of court, which is always easily obtained, have supplied any other deficiency. For this reason the only question before this court is, whether the record shows that there was evidence to go to the jury that Griffin was in the exercise of due care in connection with the injury which occurred to him.

It was suggested at the argument of the case that even under the Employers' Liability Act of Massachusetts (Acts and Resolves of Massachusetts of 1887, c. 270), on which statute the plaintiff relies, the Federal courts will apply their general rule that the want of due care on the part of the plaintiff in a case of an injury happening through negligence is a matter of defense, and that the plaintiff is not ordinarily required in the first place to give evidence touching it. That question was not raised in the Circuit Court, and has not been brought before us in such form as renders us desirous of disposing of it; and we are not required to do so in the present case.

We do not deem it necessary to set out the evidence in the court below, or to analyze it in this opinion; and we consider it sufficient to say that the case falls within the practical application of the rules touching due care, and of the inference to be drawn from the facts proven, which are accepted and approved in *Maguire v. Fitchburg R. R. Co.*, 146 Mass. 379, 382, 15 Am. Neg. Cas. 495, *ante*; *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13, 16, 15 Am. Neg. Cas. 458, *ante*; and *Maher v. Boston & Albany R. R. Co.*, 158 Mass. 36, 44, 15 Am. Neg. Cas. 459, *ante*.

We do not intend to suggest whether the propositions covered by these cases, and which we apply to the case at bar, are

or are not mere rules of evidence, as to which we are bound by the decisions of the highest court of the State of Massachusetts, because, whether we are bound by them or not, they meet our approval, which is sufficient at present. We will only add that the circumstances of the various cases which we cite, as well as those of that at bar, essentially distinguish them from cases like that of the approach of a traveler to a railroad crossing, where ordinarily it is necessary to show the performance of some positive duty on the part of the person injured in order to make out due care.

The judgment of the Circuit Court is reversed, and this cause is remanded to that court with directions to grant a new trial.

NELSON, DISTRICT JUDGE, concurred.

Webb, DISTRICT JUDGE (concurring in separate opinion): This case depends on the correctness of the ruling of the Circuit Court ordering a verdict for the defendant. As stated in the plaintiff's bill of exceptions "the defendant offered no testimony, and at the conclusion of the plaintiff's testimony asked the court to rule 'that there was no evidence that the said John Griffin was in the exercise of due care.' The judge so ruled and ordered a verdict for the defendant, and thereupon a verdict was so returned. To which ruling and order the plaintiff excepts, and she prays that her exceptions may be allowed." The only error assigned is this ruling and order of a verdict.

It is obvious that there is involved in this case thus presented a question of law as well as one of fact. If, in fact, the plaintiff had offered no evidence proper to go to the jury upon the due care and diligence of John Griffin, was the ruling correct?

Contributory negligence on the part of a person injured is always fatal to his maintaining an action for the recovery of damages on account of the negligence of a defendant. There is, however, great conflict of courts in respect to the party upon whom the burden of proof rests. Many courts hold the plaintiff bound to prove affirmatively that he was in the exercise of proper care, and that no negligence on his part contributed to the injury; others maintain the rule that contributory negligence on the part of the person injured is matter of defense, and must be proved by the whole evidence irrespective of the side by which it is produced.

In the courts of the United States the rule that contributory

negligence is a matter of defense is firmly settled. *R. R. Co. v. Gladmon*, 15 Wall. 401; *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291, 7 Am. Neg. Cas. 331; *Hough v. R'y Co.*, 100 U. S. 213, 225; *Northern Pac. R. R. Co. v. Mares*, 123 U. S. 710, 720, 721; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 557, 12 Am. Neg. Cas. 681; *Texas & Pac. R'y Co. v. Volk*, 151 U. S. 73, 77 (1). The contrary rule prevails in

1. On the question of burden of proof of contributory negligence, see the following Federal decision:

In *UNION PACIFIC RY CO. v. NOVAK* (U. S. C. C. A., 9th Circuit, E. D. Washington, April, 1894), 15 U. S. App. 400, the court (per HAWLEY, DISTRICT JUDGE) said (on page 428): "Upon the question of the burden of proof to show contributory negligence upon the part of the plaintiff, the court charged the jury as follows: 'A defense has been interposed in the answer, charging him with neglect and carelessness, which contributed in producing the injury. This would be a complete bar, if it is shown; but the burden is upon the defendant to show that by positive evidence, sufficient to outweigh all the evidence to the contrary. Unless that is so shown, no carelessness or neglect of duty on the part of the plaintiff could be a bar to his recovery. If the defendant was negligent in the particulars specified, which neglect was the direct and proximate cause of the injury, any contributory negligence on the part of the fellow-servants or co-employees of the plaintiff would not affect his right to recover damages.'

"If this charge is reasonably susceptible of the construction claimed by defendant, that it devolved upon the defendant to affirmatively prove, by positive evidence, that plaintiff was guilty of contributory negligence, independent of the evidence that was given upon the part of plaintiff, then the instruction is erroneous.

"The principle of law is well set-

tled that if the proximate and sole cause of the injury is to be attributed to plaintiff's contributory negligence, or the negligence of his fellow-servants or co-employees, this would be fatal to his right to recover, and it makes no difference how or when that fact appears during the trial, whether by inference from the facts testified to upon the part of plaintiff, or by affirmative evidence introduced by the defendant. It is wholly immaterial who proves the fact, so long as it is proven. The use of the word 'positive' in the instruction was unfortunate. The same mistake was made in another portion of the charge of the court, which required the plaintiff to bring 'affirmative evidence, of a positive character' as to the negligence of the defendant, 'sufficient to outweigh all evidence to the contrary as to those facts.'

"Wherever the facts are of such a character that a jury might reasonably infer therefrom that the defendant was guilty of negligence, or that the plaintiff contributed by his own negligence to the accident which caused the injury, it becomes a question for the jury to decide.

"It has never been required that evidence of negligence should be direct and positive. In the very nature of the case the plaintiff must labor under difficulties in proving the fact of negligence, and as the fact is always a relative one it is susceptible of proof by circumstances bearing more or less directly upon the fact of negligence,—a kind of evidence

the courts of Massachusetts, in which State this case arose. This, however, is not a matter wherein the Federal courts are bound to follow the State decisions. But it is said that this case arises under a State statute, and that the interpretation of that statute by the State court must be followed. That statute is, so far as the present inquiry is concerned, as follows:

"Where, after the passage of this Act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:—

"1. By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; * * * the employee, or in case

which might not be satisfactory in other cases open to clearer proof. This is in accord with the general principle of the law of evidence, which holds that to be sufficient evidence which in its nature satisfies an unprejudiced mind. 1 Shearm. & Redf. on Neg. (4th ed.), § 58, and authorities there cited.

"But the charge of the court is not, under the facts, susceptible of the construction sought to be placed upon it by the defendant. It is manifest, however unfortunate certain words or phrases in the charge are, that, when it is carefully considered, it simply means, and the jury must so have understood it, that the burden was not upon the plaintiff in making out his case to prove that he and his employees were entirely free from fault; that the question of contributory negligence was an affirmative defense; that the burden is upon the defendant to establish it by "evidence, sufficient to outweigh all the evidence to the contrary;" and that unless the contributory negligence "is so shown," it will not bar the right "to his recovery."

"The question as to whether the burden of proof rests upon defendant or upon plaintiff, in actions of this character, upon the issue of contributory negligence, has been the subject of frequent discussion in all of the State courts, and there never has been and probably never will be, any uniformity in the decisions in the State courts. 1 Shearm. & Redf. on Neg. (4th ed.), §§ 107, 108.

"It is sufficient to state that in a majority of the States, including the State of Washington (*Northern Pac. R. R. Co. v. O'Brien*, 1 Wash. 599; *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659), the burden of proving contributory negligence rests upon the defendant, and this is the rule almost universally followed in the United States Circuit Courts, and is approved by the decisions of the Supreme Court of the United States. *R. R. Co. v. Gladmon*, 15 Wall. 401; *Ind. & St. L. R. R. Co. v. Horst*, 93 U. S. 291; 7 Am. Neg. Cas. 331; *Hough v. R'y Co.*, 100 U. S. 213; *Northern Pac. R. R. Co. v. Mares*, 123 U. S. 710, 721." * * *

the injury results in death the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." Acts and Resolves of Massachusetts of 1887, c. 270, section 1.

The manifest purpose and intention of this legislation were to place servants and employees on the same footing with persons not employees nor servants, and to give them the same protection, in respect to injuries caused by the negligence of their employers, that persons not employees nor servants had. The statute removed, or was designed to remove, some of the pre-existing limitations upon the remedy of an employee against his employer. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 15 Am. Neg. Cas. 552, *ante*.

The words "who is himself in the exercise of due diligence at the time," introduce no new limitation or restriction of the right to recover. They leave him just where other persons stand. If they were not found in the statute, there can be no doubt that every court would imply them. The implication would be compelled by the terms of the act that "the employee * * * shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." This "same right" was a right to compensation and remedy for injury caused by the negligence of another, subject to be defeated if the injured person's own negligence contributed to produce the injury. Since the passage of this Act in 1887 numerous suits under it have been brought in the courts of the State. I do not find that in any of them the question of the effect of the words, "who is himself in the exercise of due care and diligence at the time," has challenged the consideration and interpretation of the court. The course of procedure and the rule as to the burden of proof prevailing in those courts in actions at common law have been followed without discussion or hesitation, as was to be expected. This court, therefore, is not embarrassed or controlled in the construction of the statute by any decision of the State court, and should, in view of the purpose of the Act, give a construction consistent with its own rule that contributory negligence is matter of defense. Under such construction it follows that the court below erred in ordering a verdict for the defendant, and the cause should be remanded and a new trial had.

In view of the practical importance of the legal question, affording as it does a rule applicable to all cases that may come before this court under the Employers' Liability Act of Massachusetts, it ought to be considered and determined, and if found favorable to the plaintiff the decision of this case should be based on it, rather than on the question whether any evidence was produced at the trial which could and ought to have been submitted to the jury. But while thus giving precedence to the point of law, I do not differ from other members of the court in the view that there was evidence as to the care and diligence of Griffin that should have been passed upon by the jury.

LIABILITY OF RAILROAD COMPANIES AND OTHER CORPORATIONS FOR SERVICES RENDERED BY PHYSICIANS AND OTHERS TO INJURED EMPLOYEES ON CONTRACTS MADE BY GENERAL OFFICERS OF SUCH CORPORATIONS, WHEREIN THE QUESTION OF SCOPE OF AUTHORITY IS INVOLVED.

Among the numerous cases arising out of the relations of Master and Servant are those in which the scope of authority of servants is involved in actions brought against corporations and others for medical and other services rendered to injured employees and third persons on the request or order of general officers of such corporations. The following cases (*pro* and *con* on the question) relate chiefly to services rendered to railroad employees, but there are also notes of cases arising out of services rendered to other employees and also to third persons in which the questions of scope of authority of superintendents, managers, agents, etc., in making contracts, and the liability of the principals therefor, are passed upon by the State courts.

Contract made by superintendent — Railroad company liable.

In *TOLEDO, WABASH & WESTERN R'y Co. v. RODRIGUES*, 47 Ill. 188 (January Term, 1868), where a brakeman was run over and injured and plaintiff was employed by the railway company's superintendent to nurse and take care of the injured employee, judgment for plaintiff in the Morgan County Circuit Court was *affirmed*, it being held that "when it is known that the general superintendent manages all the business of the road within his department, and binds the company by contracts on its behalf, in regard to its general business, it may safely be inferred that such a contract as this [the one in question] was within the scope of his authority."

Contract by station agent — Ratification — Railroad liable.

TOLEDO, WABASH & WESTERN R'y Co. v. PRINCE, 50 Ill. 26 (1869), was a case substantially like that of *TOLEDO, W. & W. R'y Co. v. RODRIGUES*, 47 Ill. 188, the plaintiff being a surgeon suing for services rendered an injured employee, the defendant's station agent having secured the plaintiff. The agent reported the case to the general superintendent, but there was no complaint from the latter until the plaintiff's bill was presented. The jury found there was ratification and gave verdict to plaintiff. *Judgment affirmed.*

Authority of superintendent or general agent.

The cases of *TOLEDO, W. & W. R'y Co. v. RODRIGUES*, 47 Ill. 188; *TOLEDO, W. & W. R'y Co. v. PRINCE*, 50 Ill. 26; *INDIANAPOLIS, ETC., R. Co. v. MORRIS*, 67 Ill. 295, and *CAIRO & ST. LOUIS R. Co. v. MAHONEY*, 82 Ill. 73, all recognize the doctrine that the superintendent or general agent has authority to employ a surgeon to treat a servant who has been injured.

Ratification by general superintendent.

In *TERRE HAUTE, ETC., R. Co. v. PIERCE*, 95 Ind. 496, an action by a surgeon to recover for amputating the leg of an employee injured while at work for the company, it was held that the company was liable upon the ground of ratification by the general superintendent. The facts in the *Pierce* case as to employment were almost identical with the case of *Toledo, etc., R'y Co. v. Rodrigues*, 47 Ill. 188, where the local station agent employed a person to nurse an injured employee, and the station agent notified the general superintendent of the road of the employment, and the company was held liable on the ground of ratification of the contract. The case of *Indianapolis, etc., R. Co. v. Morris*, 67 Ill. 295, was similar, except that the action was to recover for nursing and care, and the employment was by the conductor, who reported to the general officers. It was held that there was a ratification of the employment, and that the company was liable. Under a similar state of facts, a like ruling was made in the case of *Cairo & St. Louis R. Co. v. Mahoney*, 82 Ill. 73.

Contract made by conductor—Emergency—Railroad company liable.

In *TERRE HAUTE & INDIANAPOLIS R. R. Co. v. McMURRAY*, 98 Ind. 358 (November, 1884), judgment for plaintiff for \$100 in the Clinton Circuit Court was affirmed and petition for rehearing overruled. The action was brought by the plaintiff, a physician, to recover for services rendered an employee, a brakeman, whose foot was crushed between the wheel of a car of the train on which he was employed, and a rail of the track. The injury was such as demanded immediate surgical attention, and the conductor of the train requested the plaintiff to render professional aid, informing him that the railway company would pay him for such services. It was held (as per syllabus to the official report) that "where a brakeman of a railroad company, while in the line of his duty, is injured at a point distant from the chief offices of the company, and there is an urgent necessity for the employment of a surgeon to render professional services to the injured brakeman, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render professional services required by the emergency." It was also held that "there is no general liability on the part of a railroad company to provide surgical aid for sick or wounded servants, nor has the conductor any general authority to employ a surgeon, but an emergency may arise vesting such authority in the conductor." *ELLIOTT, J.*, delivered the opinion but *ZOLLARS, CH. J.*, dissented on the ground that it was not sufficiently shown that the conductor had authority to bind the company by his contract with the plaintiff.

Contract made by roadmaster, ratified by general manager, binding on railroad company.

In *LOUISVILLE, EVANSVILLE & ST. LOUIS R'y Co. v. McVAY*, 98 Ind. 391 (November Term, 1884), where one of defendant's employees was injured at a tunnel on defendant's railway and was removed to a hotel by one of defendant's roadmasters, who employed plaintiff to nurse and care for the injured person, judgment for plaintiff in action to recover for services rendered was *affirmed*. It was said (per ZOLLARS, CH. J.) that: "It is very clear, upon authority and reason, that there is nothing in the ordinary meaning of the term 'road master' from which the courts may know or presume that such employee has authority to bind the company for attendance and nursing of a person injured upon the line of the railroad, whether such person, when injured, be an employee, passenger, or a person sustaining no relation to the corporation. And could the courts judicially know that the roadmaster is a person having charge of the repairs of the road, still they could not judicially know, or presume from this, that he has authority to bind the corporation for the nursing of persons injured upon the road, whether by trains or otherwise." After citing numerous authorities the court said: "It must be held that the general manager had authority to make the contract with appellee, and hence authority to ratify the contract as made by the roadmaster; and that he did so ratify it and thus made the corporation liable."

The ruling in the *McVAY* case, *supra*, seems to be in harmony with the ruling in the *McMURRAY* case, *supra*.

Ratification of act of conductor.

In *TERRE HAUTE & INDIANAPOLIS R'y Co. v. STOCKWELL*, 118 Ind. 98 (November Term, 1888), action by physician for services rendered to injured employee on request of conductor, who told him to send bill to superintendent and the railroad company was notified and permitted him to render the services, it was held that the company ratified the conductor's act, and was liable for the services rendered until the patient was convalescent. Judgment for plaintiff in the Putnam Circuit court *affirmed*.

See, also, *LOUISVILLE, NEW ALBANY & CHICAGO R'y Co. v. SMITH ET AL.*, 121 Ind. 353 (November Term, 1889), where the question of employment of surgeon by conductor and ratification by the company was passed upon.

General superintendent — Scope of authority.

See *CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R'y Co. v. DAVIS*, 126 Ind. 99 (May Term, 1890), on the question of authority of general superintendent to employ surgeon.

Recovery limited to immediate service rendered to injured employee.

In *EVANSVILLE & RICHMOND R. R. Co. v. FREELAND*, 4 Ind. App. 207 (November Term, 1891), where a conductor employed a physician, with the concurrence of the local surgeon of the company, to attend an employee injured in a wreck, and an operation was performed by such physician, the local surgeon attending upon other injured persons, the railroad company was bound by such employment and liable for the services rendered in such operation, but not for services rendered after the operation. Judgment for

plaintiff, the physician attending the said injured employee for \$100 was *affirmed*, the recovery being limited to the services rendered in the amputation of the employee's leg, and not for services rendered thereafter.

Contract made by conductor binding on railroad company.

In *TOLEDO, ST. LOUIS & KANSAS CITY R. R. Co. v. MYLOTT*, 6 Ind. App. 438 (November Term, 1892), action to recover for services in furnishing board and room and care to an injured brakeman in defendant's employ, the conductor of the train requesting such services, it was held that the conductor, who was the highest officer of the company present at the time of the accident, had power to bind the company for services to the injured employee, and judgment for plaintiff in the Wells Circuit Court was *affirmed*.

The power of the general officers of a railroad company to employ medical attendance for workmen injured in the performance of duty has been fully considered and affirmed in the Indiana Supreme Court in *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358, and *Louis, etc., R. Co. v. McVay*, 98 Ind. 391, which cases have been followed and approved in *Terre Haute, etc., R. Co. v. Brown*, 107 Ind. 336; *Louis, etc., R. Co. v. Smith*, 121 Ind. 353; *Cincinnati, etc., R'y Co. v. Davis*, 126 Ind. 99; *Evansville, etc., R. Co. v. Freeland*, 4 Ind. App. 207, etc.

See, also, *BEDFORD BELT R'y Co. v. McDONALD*, 17 Ind. App. 492 (1896), where it was held that the general officers of a railroad company have authority to employ physicians and surgeons to attend injured employees.

Authority of claim agent and surgeon.

See *BIGHAM v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 79 Iowa, 534 (1890), an action to recover on alleged contract for services rendered in nursing an injured employee of defendant, where the evidence was held sufficient to warrant the finding that plaintiff was hired by defendant, through its claim agent and surgeon, as alleged.

Authority of general agent.

In *ATLANTIC, ETC., R. Co. v. REISNER*, 18 Kan. 458, the holding was that the general agent of a railroad company was authorized to employ a surgeon to attend one of the brakemen injured while in the service of the company. The court said: "The defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employee before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service."

But in the *Reisner* case, *supra*, it was said: "The authorities cited sustain the proposition that a station agent is not authorized, by virtue of his position as such agent to employ a hotel keeper, at the expense of the company, to attend to one of its brakemen, injured while working for the company, nor to furnish such employees with board and lodging while disabled." This doctrine seems to be recognized in *Toledo, etc., R'y Co. v. Rodrigues*, 47 Ill. 188; *Toledo, etc., R'y Co. v. Prince*, 50 Ill. 26; *Cairo, etc., R. Co. v. Mahoney*, 82 Ill. 73; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Atchison, etc., R. Co. v. Reeher*, 24 Kan. 228.

Authority of general superintendent.

In the case of *PACIFIC R. CO. v. THOMAS*, 19 Kan. 256, it was held that, in the absence of evidence to the contrary, it should be presumed that the general superintendent of a railway has authority to employ physicians and surgeons to attend an employee injured while working for the company, and hence power to ratify an employment by agents who had no such authority. The company was held liable on ground of ratification of employment by superintendent.

In *ATCHISON, ETC., R. CO. v. REECHER*, 24 Kan. 228, it was held that the general superintendent of a railroad company has authority to employ a surgeon to attend a man injured while in its service.

Authority of division superintendent.

In *UNION PACIFIC R'Y CO. v. WINTERBOTHAM*, 52 Kan. 433 (1893), where a brakeman's foot was crushed and the division superintendent of defendant company telegraphed to the station agent to notify physician to render medical and surgical services to the injured employee, it was held that "a division superintendent of a railroad company has authority to employ physicians and surgeons to attend upon employees injured in the service of the company he represents." Judgment for plaintiff, a physician, for services rendered to injured employee of the railroad company, *affirmed*.

See, also, *Union Pacific R'y Co. v. Beatty*, 35 Kan. 265; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Atchison, etc., R. R. Co. v. Reeher*, 24 Kan. 228.

Authority of station agent.

In *STEELSMITH v. UNION PACIFIC R'Y CO.*, 1 Kan. App. 10 (1895), action by a physician and surgeon for a surgical operation upon an injured employee in defendant's service performed at the request of defendant's station agent, it was held that "the fact that a station agent of a railway company had, on several prior occasions, employed physicians, including the plaintiff, to treat employees of the railway company who received injuries while in the performance of their duty as such employees, and that all bills rendered for such services were afterward paid by the railway company without objection, is some evidence going to establish the authority of the agent to bind the company by the employment of a physician under similar circumstances." Judgment for defendant in the Dickinson District Court *reversed*.

Railroad agent's authority.

In *NORTHERN CENTRAL R'Y CO. v. STATE*, 29 Md. 420, it was held that it is the duty of agents in charge of a railroad train to take care of one injured by a collision, and to do it with a proper regard to his safety and the laws of humanity.

Physician employed by yardmaster — Authority of general superintendent — Liability of railroad company — Divided court.

In *MARQUETTE & ONTONAGON R. R. CO. v. TAFT*, 28 Mich. 289 (1873), action by a physician to recover for services rendered to one of defendant's employees, being engaged to attend said employee by defendant's yardmaster, judgment for plaintiff (the court being equally divided) was *affirmed*. The syllabus to the official report states the points as follows:

"A railroad yardmaster, whose business is to have charge of the yard, make up trains in the yard, and who has a right to employ men for all purposes they are required for in the yard and to do his part of the business, and to discharge them, to employ brakemen for himself and also for the road trains, and whose authority consists in employing men in his department, has no authority by virtue of his office alone, to bind the railroad company employing him, in the employment of a surgeon to attend one of the men under him in the service of the company, who had been run over and injured by the company's cars.

"While, as a general rule, a railroad company is not liable for injuries received by their employees in their service, caused by the negligent conduct of another servant, yet this rule is subject to the exception of cases where the injury comes from the negligent employment by the company of reckless or incompetent servants or worthless machinery. COOLEY, J., with whom CHRISTIANCY, CH., J. concurred.

"Whether or not a railroad company can be held bound by the employment by its general superintendent of a surgeon and physician to attend one of its servants who had been injured by their cars while employed in their service, in the absence of any showing of authority aside from that to be inferred from the fact of his being general superintendent: *Query*. COOLEY, J., with whom CHRISTIANCY, CH. J., concurred, holding the affirmative, and GRAVES, J., with whom CAMPBELL, J., concurred, holding the negative."

The opinion in the TAFT case, by Mr. Justice Cooley, reviewed the cases holding the affirmative view, as expressed in the preceding paragraph of the head note, citing *Walker v. Great Western R. Co.*, L. R., 2 Exch. 228 (which distinguished that case from *Cox v. Midland Counties R. Co.*, 3 Exch. 268); *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, and *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26.

New York decision disapproved.

In referring to the principles in the cases bearing on his view of the question, Mr. Justice Cooley said: "This precise question has been judicially passed upon in several cases, and it is gratifying to know that the rule of justice and of public policy, which seems to us so obvious, has been recognized elsewhere with a single exception, and that in a court of inferior jurisdiction. In *STEPHENSON v. N. Y. & H. R. Co.*, 2 Duer (N. Y.), 341, it was decided that it was not within the general authority of the superintendent of a railroad 'to arrange and liquidate claims against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair or remedy the consequences of such negligence.' And accordingly it was held that the superintendent could not contract on behalf of the company for medical assistance to a child run over by the cars of the company. This decision, so far as we know, stands alone, and we hazard nothing in saying that it is opposed to the general, if not universal, practice of railroad companies in similar cases." * * *

In *TERRE HAUTE & INDIANAPOLIS R. R. Co. v. McMURRAY*, 98 Ind. 358, *supra*. ELLIOTT, J., in discussing and distinguishing the case of *MARQUETTE, ETC., R. Co. v. TAFT*, 28 Mich. 289 (see preceding paragraph), said: "One opinion was written by GRAVES, J., and proceeds on the broad ground that no officer of the company could bind it to pay for surgical services rendered an

employee. That case is, however, distinguishable from the present, even upon the theory adopted in the opinion of Judge Graves, for in this case [the McMurray case] there was an immediate necessity for surgical aid, while in the one cited [the Taft case] there is not shown to have been any such necessity. Judge Cooley's opinion is a model of judicial reasoning, and forcibly maintains the duty of railway companies to provide surgical aid for its servants in cases of accidents incident to their employment."

English cases — Authority of general manager.

In *WALKER v. GREAT WESTERN R'Y Co.*, L. R., 2 Exch. 228, it was held that the general manager of the company had authority to employ a surgeon for a servant injured in the company's service, and that the company was liable therefor.

Authority of sub-inspector of police.

In *LANGAN v. GREAT WESTERN R'Y Co.*, 30 L. T. N. S. 173, aff'g 26 id. 577, where persons injured in a collision were carried to an inn by authority of the station master, and a sub-inspector of railway police in the district, who was at such time the superior of the station master and other servants of the company, ordered stimulants to be served to the injured persons, and told the innkeeper that the company would see that he was paid for the same, it was held that the evidence was sufficient to show the authority of the sub-inspector to bind the company for supplies furnished by the innkeeper to such injured persons.

Station master not authorized to contract for medical services.

In *COX v. MIDLAND R'Y Co.*, 3 Exch. 268, where a physician was employed by a station master, who acted as the chief officer of the passenger and other departments, to attend upon a person injured by the company's employees, it was held that the company was not liable. It was ruled that it was not within the scope of employment of station masters or other railroad employees to bind the railroad company by contracts for surgical attendance on injured passengers.

When contract made by conductor not binding on railroad company.

In *SEVIER v. BIRMINGHAM, SHEFFIELD & TENNESSEE RIVER R. R. Co.*, 92 Ala. 258 (May, 1891), it was held that the railroad company was not liable for the services of plaintiff, a physician, rendered to an injured employee, a brakeman, where the physician was called by the conductor of the train, said conductor not having authority to employ physicians in such cases, and it appeared that he had not consulted the superintendent as to the employment of plaintiff.

Attorney for railroad not authorized to employ physician.

In *ST. LOUIS, A. & T. R. Co. v. HOOVER*, 53 Ark. 377 (1890), it was held that an attorney for a railroad company has no authority to employ a physician on its behalf.

In the Hoover case, *supra*, the court after citing and stating the principle decided in *Terre Haute & Ind. R. Co. v. McMurray*, 98 Ind. 358 (*supra*), said: "The authority existing in such cases is exceptional. It grew out of

the present emergency, and the absence, and consequent inability to act, of the railway's managing agent. Its existence cannot extend beyond the causes from which it sprang." In the McMurray case the conductor, in the absence of superior officers, was held to be a general agent for the purpose of employing surgical assistance for an injured brakeman.

Conductor acting in emergency — Scope of authority.

In *TERRE HAUTE & INDIANAPOLIS R. R. Co. v. BROWN*, 107 Ind. 336 (September, 1886) appeal from a judgment in an action by a physician to recover from the railroad company amount of bill for services rendered in attending a brakeman in the company's employ who while attempting to step from the engine, slipped, and one of his feet, coming under the wheels, was crushed, judgment for \$100 for plaintiff in the Clinton Circuit Court was *reversed*, it being held (as per syllabus to the official report) that "a railroad conductor, in a pressing emergency, may employ a surgeon to attend a brakeman who is injured while on duty, and, in a proper case, bind the company for the professional services so rendered; but he cannot authorize the surgeon to employ, at the expense of the company, such assistants as he may deem necessary."

Failure to show authority of physician to bind railroad company.

In *EVANSVILLE & INDIANAPOLIS R. R. Co. v. SPELLBRING*, 1 Ind. App. 167 (November Term, 1890), an action against the railroad company to recover for services rendered as a physician to a person injured in an accident on its road, judgment for plaintiff was *reversed* for error in admitting testimony of another physician that the company would pay plaintiff's bill; where it was not shown that such physician had authority to bind the company. The case of *Terre Haute, etc., R. R. Co. v. Brown*, 107 Ind. 336, *supra*, was cited as being analogous in many respects to the Spellbring case, and decisive upon the question of the employment of the plaintiff under the alleged contract with the other physicians.

When railroad company not liable for medical services to injured employee.

In *CHICAGO & ERIE R. R. Co. v. BEHRENS*, 9 Ind. App. 575 (November Term, 1893), action to recover for services rendered to an injured employee, judgment for plaintiff in the Porter Circuit Court was *reversed*, the syllabus to the official report stating the case as follows:

"Where a special verdict, in an action against a railroad company to recover for services rendered one of defendant's injured employees, was that N. was a regularly appointed physician of the defendant company, and, under the terms of his contract with defendant, was required to do the medical and surgical work of the company in a prescribed territory; that an injured employee of the defendant was placed in N.'s care by defendant's conductor; that the character of the employee's injuries were such as to require immediate attention when N. was called; that under the directions and at the request of said N., such employee was removed from the car on defendant's railroad to plaintiff's home, and that the removal was urgent and necessary to enable N. to properly care for the employee; that the services performed and articles furnished by plaintiff, including board, were of the

value of sixty-seven dollars and ninety-five cents, and that they were performed and furnished at the request of N., with the implied understanding that they should be paid for by the defendant railroad company,— such facts do not bring the case within the rule under which railroad companies are liable for services rendered to their injured employees."

When station agent not authorized to make contract.

The case of *TUCKER v. ST. LOUIS, ETC.*, R'y Co., 54 Mo. 177, decides that a station agent has no authority to employ a surgeon, where no element of pressing necessity entered into the case. It was said in that case: "It is only shown that they [the station agent and the conductor] were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to, and treat, persons accidentally injured on the road." Mr. Justice Elliott, in the case of *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358, in discussing the foregoing ruling in the Taft case, said: "It may be that this statement is true in ordinary cases, but when we add the element of immediate and pressing necessity, a new and potent factor is introduced into the case."

Failure to show authority of superintendent.

In *BROWN v. MISSOURI, ETC.*, R'y Co., 67 Mo. 122, it was held that the superintendent of the company could not bind the company for "a small bill of drugs furnished a woman who had been hurt by the locomotive or cars of the defendants." There was a brief opinion rendered in the Brown case which presented no feature of emergency requiring prompt action. No proof was offered as to the duties of the superintendent.

Authority of railroad physician.

In *MAYBERRY v. CHICAGO, ETC.*, R. Co., 75 Mo. 492, it was held that the fact that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a brakeman injured on one of the company's trains.

Authority to contract not shown.

COLUMBIA & CINCINNATI ST. R'y Co. v. WISEMAN, 1 Ohio C. C. 246 (1885), 10 Am. Neg. Cas. 40n, was an action by a physician to recover for medical and surgical services rendered to one of defendant's injured passengers. Judgment for plaintiff was reversed on the ground that defendant's servant had no authority to employ plaintiff, and that the evidence did not clearly show that defendant's servant had employed plaintiff to perform the services.

Business manager of corporation has authority to contract.

In *SWAZEY v. UNION M'FG Co.*, 42 Conn. 556, the court held that the business manager of a manufacturing corporation had authority to employ surgical aid for a lad who had received an injury in its service.

Superintendent has no authority to contract in absence of emergency.

In *CHAPLIN, ETC.* (trading under name of the *HELTONSVILLE M'FG Co.*) *v. FREELAND*, 7 Ind. App. 676 (May Term, 1893), an action to recover for

services rendered to an injured employee of defendant, plaintiff, a physician, being called to treat such employee by defendant's foreman and the superintendent, judgment for plaintiff in the Lawrence Circuit Court was *reversed*, it being held the superintendent had no authority to bind his principal in the absence of any facts showing an emergency.

Foreman not authorized to contract.

In *GODSHAW v. STRUCK & BRO.*, 109 Ky. 285 (1900), it was held that a foreman of carpenter work on a building has no authority to engage medical services for one of his men injured by a brick falling from a scaffold, and defendants were not liable in an action by a physician to recover for such services to the injured employee.

In *HOLMES v. McALLISTER ET AL.*, 123 Mich. 493 (1900), plaintiff, a physician, sued defendants for services rendered an injured employee, being sent for by defendants' manager or foreman to attend to the case. Defendants held not liable, and judgment for plaintiff *reversed*. The court (per Grant, J.) cited the authorities favoring the liability of railroad companies for acts of their officers in employing physicians for injured persons, but held that "these authorities go no further than to hold the parties liable for the immediate services made necessary by a present urgency; authority to act is implied from the necessity of the case."

General manager of mine not authorized to contract for services to injured employees.

In *SPELMAN v. GOLD COIN MINING & MILLING CO.*, 26 Mont. 76, 66 Pac. 597 (1891), it was said, in the opinion by PIGOTT, J., that: "The fact that a certain person is general manager of a mining company does not, in and of itself, imply authority in him to bind the company in matters other than those of business affairs. It may not be said, as matter of law, or declared as a fact judicially known, that general managers of mining corporations are usually clothed with such authority as that assumed by Loomis. So to hold would be to affirm that every general manager may contract with physicians and surgeons in behalf of the mining companies for which he is agent, irrespective of the rights of the company and without regard to whether it was at fault." * * * The court cited the numerous cases which hold that certain officers may bind the company for medical services authorized by such officers to injured employees, and also cited some of the cases in which the contrary doctrine is announced, among them being *BROWN v. Mo., K. & T. R. Co.*, 67 Mo. 122; *STEPHENSON v. N. Y. & H. R. Co.*, 2 Duer (N. Y.), 341. Continuing, the court said: "Whatever may be the rule touching the presumptions with respect to the powers of railway officials, in our opinion a presumption that the general manager of a mining corporation has been clothed with the delegated power to exercise the authority which Loomis is assumed to exercise cannot be indulged."

In the *SPELMAN* case, *supra*, it appeared that several employees were injured in a blasting explosion in defendant's mine, and that one Loomis, the general manager of the company, sent them to a hospital, and made promises to the physicians and surgeons who treated the injured persons to the effect that the company would pay them. The action was brought by plaintiff to recover value of physicians' services rendered to the injured employees. Judgment for defendant.

Medical and surgical aid to injured employees.

In connection with the foregoing cases relating to liability of railroad and other corporations for contracts made by agents for medical services to injured employees and other persons, it may be interesting to refer to the following cases on the question as to whether a master is bound to furnish medical aid to servants injured in the performance of duties, and as to liability for mistakes or malpractice where such aid is furnished:

Railroad company may employ medical aid for injured employees.

In *BEDFORD BELT R'Y Co. v. McDONALD*, 17 Ind. App. 492 (November Term, 1896), action by a physician for services rendered to injured employees in defendant's service, judgment for plaintiff in the Monroe Circuit Court was *affirmed*. It was held that "the general officers of a railroad company have power to employ medical attendance for workmen injured in the performance of duty in the company's service" (citing *Toledo, etc., R. Co. v. Mylott*, 6 Ind. App. 438); and that the president, vice-president, general manager, secretary and treasurer of the railway company were general officers of the company. It was also held that the employment by such general officers of a physician and surgeon to employees injured in the course of employment was not *ultra vires*.

On a former appeal, *BEDFORD BELT R'Y Co. v. McDONALD*, 12 Ind. App. 620, the complaint was held bad for failing to show that plaintiff was a licensed physician and that the services were rendered for workmen of defendant injured in the performance of duty, or for persons injured by its trains.

In the *McDONALD* case, *supra*, the court cited *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358; *Louis, etc., R'y Co. v. McVay*, 98 Ind. 391; *Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458; *Swazey v. Union M'fg Co.*, 42 Conn. 556; *Cincinnati, etc., R'y Co. v. Davis*, 126 Ind. 99; *Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 98; *Terre Haute, etc., R. Co. v. Brown*, 107 Ind. 336; *Louis, etc., R'y Co. v. Flanagan*, 113 Ind. 488; *Board, etc., v. Citizens' Street R'y Co.*, 47 Ind. 407.

In the *McDONALD* case, *supra*, the court in discussing the corporate powers of railroad companies, said: "During recent years many railroad companies have established voluntary relief departments for the purpose of accumulating a fund out of which to pay employees, who are members, sick and disablement benefits, and the courts of many States have assumed that the act of establishing such a department is within the express or implied powers of the corporation." *Miller v. Chicago, etc., R'y Co.*, 65 Fed. 305; *Lease v. Penn. Co.*, 10 Ind. App. 47; *Vickers v. Chicago, etc., R. Co.*, 71 Fed. 139; *Donald v. Chicago, etc., Ry. Co.*, 93 Iowa, 384; *Johnson v. Phila., etc., R. Co.*, 163 Pa. St. 127; *Voluntary Relief Department (of the Pennsylvania Lines West of Pittsburgh) v. Spencer*, 17 Ind. App. 123.

As to powers of railroad company: Query? — But not liable for mistake of surgeon when employed.

In *SOUTH FLORIDA R. R. Co. v. PRICE*, 32 Fla. 46 (1893), 13 Am. Neg. Cas. 839, on the question of liability of railroad company for negligence of surgeon attending injured employee, it was held that: "Whether it is within the corporate powers of a railroad company, under any circumstances, to oblige itself to the rendition of medical or surgical aid to its sick or injured

employees, by assuming it as a duty or otherwise, or to become liable for any negligence of any such surgeon acting in the line of his profession: *Quære?* If it can become so liable, it was held that its whole duty in that respect will have been performed when it employs a person of ordinary competency and skill in that profession; and, that having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such."

See, also *Secord v. St. Paul, M. & M. R'y Co.*, 18 Fed. 221; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272; *Laubheim v. De Koninglyke Nedelandsche Stoomboot Maatschappij*, 107 N. Y. 228.

Railroad company not liable for mistake made by injured employee in choice of physician or surgeon.

OHIO & MISSISSIPPI R'Y CO. v. EARLY, ADM'X, 141 Ind. 73 (November Term, 1894), was an action against the railway company to recover damages for alleged negligence in failing to furnish medical and surgical assistance to plaintiff's intestate, an employee of defendant, who received a dangerous injury, resulting in his death. It was held that the duty of a master to furnish medical and surgical aid to an employee injured in his service does not give him the power to dictate what particular physician or surgeon shall treat such servant, nor is the servant deprived of the right to select time, place and person to treat him. But where the master is ready to meet the emergency, which the servant declines, then such emergency ceases and the duty with it; and if the servant's choice results in a mistake the company is not liable. Judgment against the company was *reversed*.

Railroad company not liable for malpractice of surgeon attending injured employee.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R'Y CO. v. SULLIVAN, 141 Ind. 83 (November Term, 1894), was an action brought by an employee for "unlawfully, wrongfully and unnecessarily amputating plaintiff's right arm." The plaintiff was injured in the course of his duties and the defendant company provided a surgeon for him, who amputated his arm. It was held that a railroad company was not legally bound to furnish surgical aid for injured servants, but if it does so, and the surgeon amputates a limb against the injured servant's express command, the company is not liable to the servant in damages for such amputation. Judgment for plaintiff in the Cass Circuit Court was *reversed*.

In *EIGHTMY v. UNION PACIFIC R'Y CO.*, 93 Iowa, 538 (1895), it was held that "a railroad company is not liable for the malpractice of surgeons voluntarily furnished by it in cases of injuries to employees, if reasonable care be used to obtain competent surgeons."

See, also, *YORK v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 98 Iowa, 544 (1896).

No legal obligation to furnish medical aid to injured servant.

In *DAVIS v. FORBES*, 171 Mass. 548, 4 Am. Neg. Rep. 289 (1898), where an employee was injured and one of the counts of the declaration alleged that the injuries were aggravated by defendant's failure to procure prompt

medical aid for the injured servant, it was held that "the defendant was under no legal obligation to furnish the plaintiff with medical attendance, even if he had been liable for the injury, and the ruling that the plaintiff could not recover under the second count was, therefore, correct. The case of a seaman injured on shipboard is different."

See, also, *Denver & Rio Grande R. R. Co. v. Iles*, 25 Colo. 19.

English cases.

As to the master's liability for medical attendance, etc., upon an injured servant, see *Wennall v. Adney*, 3 B. & P. 247; *Atkins v. Banwell*, 2 East, 505; *Scarman v. Castell*, 1 Esp. 270; *Cooper v. Phillips*, 4 C. & P. 581; *Sellen v. Norman*, 4 C. & P. 80; *Rex v. Winterset*, Cald. 298; *Reg. v. Smith*, 8 C. & P. 153.

THE QUINCY MINING COMPANY v. KITTS.⁽¹⁾

Supreme Court, Michigan, October Term, 1879.

[Reported in 42 Mich. 34.]

EMPLOYEE FALLING INTO EXCAVATION IN MINE—PLANK OF BRIDGE OVER EXCAVATION BREAKING—ASSUMPTION OF RISK—DELEGATION OF MASTER'S DUTY TO AGENT—LIABILITY FOR NEGLIGENCE OF AGENT—FELLOW-SERVANT—INSTRUCTION.—Where an employee in defendant's copper mine, while crossing a "bridge" over an excavation in the mine, was injured by the breaking of one of the planks of the "bridge" which precipitated him into the excavation, a distance of about 100 feet, judgment for plaintiff was reversed, the rulings being stated in the syllabus to the official report as follows:

"A servant can not recover from his master for an injury received in his service without showing some fault on the part of the master.

"A servant assumes all the usual risks of his employment, including the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence.

"A master can not, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants; and if he does delegate it to a general manager, foreman or superintendent, he remains responsible.

1. The *Michigan* and *Minnesota* notes, the editor has placed a few cases, references to which appear on *Michigan* and *Minnesota* leading several pages in this volume of *AM. NEG. CAS.* will be reported in vol. 16 be placed in their proper order in the next volume of *AM. NEG. CAS.* For convenience of the practitioner, however, and to avoid confusion in the references to The *KITTS* case is referred to in a note on page 24 of this volume.

"A servant does not assume the risk of the master's negligence, or that of anyone to whom the master entrusts his superintending authority.

"A servant assumes the risk of a fellow-servant's negligence even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other."

ERROR to Houghton. Trespass on the case. Defendant brings error. The case is stated in the opinion. *Judgment reversed.*

CHANDLER & GRANT, T. L. CHADBOURNE, and ASHLEY POND, for plaintiff in error.

DAN. H. BALL, for defendant in error.

Cooley, J. — Kitts sued the mining company to recover damages for an injury alleged to have been suffered by himself through the company's negligence while in its employ as a miner (1).

1. The declaration referred to in the opinion in the Kitts case (the case at bar) is set out as a footnote to the official report and is as follows: "County of Houghton, ss.:

"Joseph Kitts, of said county, complainant herein, by Ball & Owen, his attorneys, complains of the Quincy Mining Company, a corporation existing under the laws of this State, and doing business in said county of Houghton, defendant herein, of a plea of trespass on the case, filing this declaration as commencement of suit. For that whereas, the said defendant, heretofore, to wit: on the 20th day of April, A. D. 1876, and for a long time prior thereto, to wit: at said county of Houghton, was the owner of, and was operating and working a certain copper mine there situated, for the working of which said defendant required and employed a large number of men, and wherein were shafts and other excavations sunk to a great depth, and sundry and numerous drifts or levels, in which, for the purpose of operating said mine, a large number of men employed as aforesaid were required to work, and

to pass and repass; and that in the floor of one of said 'drifts' or 'levels' of said mine, to wit: that known as the 'hundred fathom level,' along which the employees of said defendant were required to pass and repass many times daily, was a deep and dangerous excavation, which required to be bridged over and was bridged over by said defendant, in order that its said employees while engaged about the work of said defendant, and under its direction and requirement, might pass along said 'drift' or 'level,' and said employees were, by said defendant, required to pass over said excavation upon the bridge so constructed by it, about their work in said mine.

"And by reason of the premises, it became and was the duty of said defendant to use and exercise reasonable care and diligence in the construction and maintenance of such bridge, and to keep the same in a secure and safe condition -- its said employees to pass over, so long as they were so required to pass over said bridge, in doing the work of said defendant.

"Yet the said defendant, well

It appears from the evidence that what in the declaration is called a bridge over the chasm where the accident occurred, consisted merely of two timbers laid side by side, one of which broke and fell with the plaintiff as he was passing over. The timbers were of pine, and had been in place some five years. The evidence tended to show that they disclosed no defect when put in, and that if sound originally, five years was not time sufficient to cause dangerous decay or weakness. The only evidence of any effort to examine the broken timber after the accident showed that it fell among others where it could not be distinguished, and the occasion of the breaking was, therefore, wholly unexplained. Other persons, including the plaintiff himself, had crossed upon these timbers with safety on the same day.

It was suggested, rather than urged, on the part of the defense, that the timber may have been weakened by a fragment of a rock falling upon it from above, and an inference to

knowing the premises, did not nor would keep and maintain said bridge in such condition as to be safe for its said employees to pass over, but negligently and carelessly suffered the same to become unsafe, weak and insecure, and suffered the planks of which said bridge was constructed to become decayed, and negligently and carelessly suffered said decayed and weak planks to remain in said bridge for its said employees to pass over, although the same were unsound and of insufficient strength for said employees to pass over with safety.

"And the said plaintiff avers that heretofore, to wit: on the day and year first aforesaid, he was an employee of said defendant, and was hired by said defendant to labor for it in said mine, in and about the working thereof, and that while he was carefully and prudently passing along said 'drift' or 'level' and over said bridge, in obedience to the orders and requirements of said defendant, and in the course of his said employment, ignorant of the unsafe condition of said bridge, and of the danger,

to wit: on the day aforesaid, one of the planks of said bridge, upon which he was necessarily walking, being weak and decayed as aforesaid, gave way and broke, and by reason thereof, and by reason of the negligence, carelessness and misconduct of the defendant as aforesaid, the plaintiff, without fault or negligence on his part, fell down said excavation, to a great depth, to wit: to the depth of one hundred feet, upon the rocks at the bottom thereof, and was greatly wounded and injured by said fall, in the thigh, leg, side and head, and thereby became and was sick, disordered and sore for a long space of time, to wit: hitherto, during all which time he has suffered great pain, and has been put to great expense for medical attendance, care and nursing, to wit: the sum of one thousand dollars; and by reason thereof, he has become permanently disabled and crippled in his left leg, and is entirely deprived of the use thereof, and to the damage of the said plaintiff of twenty thousand dollars, and thereupon he brings suit, etc."

this effect might be drawn from the proofs. On the other hand, the effort of the plaintiff seems to have been directed to satisfying the jury that the timber must have been weak originally, or became weakened from some unexplained cause, and that from want of proper supervision the defect had never been discovered. An effort was made to bring home the want of proper supervision to one Wagner, who was said to be charged with the duty, and who, though he had casually examined the timbers sometimes, had never applied some of the most simple and usual tests, such as striking with a hammer, and piercing with a sharp instrument. Wagner was what was called a timberman in the mine; the timbermen put in and looked after such bridges or passages, and Wagner was sometimes called captain, as he had some authority over other timbermen, and might direct them as to their work. He, however, as well as the others, was under the general supervision and control of Capt. Cliff, who had the entire charge of the underground work. No claim was made that either Cliff or Wagner was incompetent, or that the company had been negligent in the employment of incompetent persons, and the principal reliance of the plaintiff seemed to be on such inferences of negligence on the part of Wagner as might be drawn from the evidence.

The circuit judge was requested to instruct the jury that even if they found that Wagner was negligent, yet his negligence was the negligence of a fellow-servant of the plaintiff, and of this the plaintiff took the risk. This was refused on the ground, as would seem, that in respect to the supervision of this bridge or passageway Wagner was charged with the responsibility of the company, and his neglect was the neglect of his principal. As between the competent and any third person, the extent of the authority or responsibility of Wagner would have been immaterial; but when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow-servants will sometimes be careless and that injuries will result. All that can be required of the master in that regard is that his servants shall be pru-

dently chosen, and that they shall not be retained in his service after unfitness or negligence has been discovered and has been communicated to him. This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to intrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business; if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority. *Albro v. Agawam Canal Co.*, 6 Cush. 75; *McAndrews v. Burns*, 39 N. J. 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473.

But Wagner did not stand in respect to this company in any such position. He was no superintendent or manager; he was nothing but a fellow-servant of the plaintiff. The duties of the two were different, it is true, but so commonly must the duties of fellow-servants be. He had one thing to do and the plaintiff another, but neither stood in the master's place in respect to the other; and if it be true, as the plaintiff claimed, that Wagner had special authority and was charged with special duty in respect to the particular passageway, this cannot vary the legal aspects of the case. In any such business there must be division of employments among servants; one looks after one thing and another after another; but this each understands when he enters the service: he knows that his fellow-servants are to be charged with duties and responsibilities of differing natures and differing grades, and he also knows that one of the necessary risks of the employment is that any one of them may be negligent and cause him injury. This risk he assumes. It is immaterial that the negligent servant was in a position of greater responsibility than himself, or in a different line of employment, so long as both were in the same general business, so that the negligence of the one might contribute to the danger of the other. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *McAndrews v. Burns*, 39 N. J. Law, 117.

If, therefore, it had appeared that Wagner was negligent, as the plaintiff claimed, the action must, nevertheless, have failed. But we look in vain in the record for any evidence that Wagner was negligent. It may be guessed or surmised that there was negligence somewhere, and one juror may guess that it was in the want of careful selection of timber; another, that it was in the want of subsequent inspection, or in the want of care to prevent rocks falling on the bridge; but the case affords no safe ground for anything beyond conjecture; and if the master can be held liable under the circumstances which the record discloses, on mere guesses or inferences respecting the existence of fault somewhere, the rule that an employee assumes the ordinary risks of his employment will be wholly done away with. It is too late at this day to enter upon any discussion or defense of that rule; it has been too often enforced in this State and is too salutary in its effects upon the care and diligence of those engaged in employments where those qualities are especially requisite, to be now disturbed or questioned. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Wonder v. Balt., etc., R. Co.*, 32 Md. 417, 15 Am. Neg. Cas. 352, *ante*.

The judgment must be reversed with costs and a new trial ordered. The other justices concurred.

MINOR EMPLOYEE INJURED BY FOOT CATCHING IN GEARING-WHEEL IN SAW-MILL—ACCIDENT.—In **SJOGREN v. HALL et al.**, 53 Mich. 275 (*April Term, 1884*), judgment for plaintiff was *reversed* (1). The material facts were stated by COOLEY, CH. J., as follows: "The defendants are joint owners of a steam saw-mill at Muskegon. In September, 1882, three of the defendants were operating the mill, and it is claimed that the fourth was so interested in the result of the business as to be jointly liable with the others for negligent management. A large force of hands is employed in the mill when it is in operation. It stands with one end to the lake, and the logs are taken directly from the water to the log deck. The log-way for this purpose is an inclined trough-shaped way, in the bottom of which runs an endless chain with spikes upon it, which take hold upon the log and carry it up the trough to a spike roller, which catches it and tolls it to one side on the log deck. The chain and the spike roller are moved and controlled by a large iron gearing-wheel, or bull-wheel at the upper end of the log-way. The wheel gearing has a lever attached, which

1. The case of *Sjogren v. Hall*, 53 Mich. 275, is referred to in a note on page 399 of this volume.

is operated by a man in charge, who throws the wheel in and out of gear at pleasure, and moves or stops the logs as occasion may require. It sometimes happens that a crooked log, in coming up, will roll to one side or the other, and that the man in charge will need assistance to bring the log back to its place. When he does so he calls for help, and this help is furnished by some one employed on the same floor. The bull-wheel is a heavy iron wheel, about thirty-eight inches in diameter. Its speed is about fifteen revolutions to the minute, and it runs within an inch or so of the bridge tree which supports it. The bridge-tree on the side where the injury occurred is ten inches in width, and at the time of the injury there was a box at the side of it, and of the same height, which gave ten inches additional width. The center of the shaft of the wheel sat a few inches above the bridge-tree so that the wheel was more than half above it. The wheel was entirely uncovered. The man in charge stood partially behind the wheel and above it. The injury occurred September 12, 1882. The plaintiff, who was eighteen years of age, had been at work in the service of the defendants, who were operating the mill, and had been employed on the log deck for four weeks or so at that time. His business was to catch the sawed lumber from the carriers, and place it where it should be required. While working there he had been called two or three times to assist the man at the bull-wheel in bringing a log back to its place, and had given the required aid. In the afternoon of the day named he was called to give assistance again, and he went with his cant-hook, stepped upon the box by the side of the bridge tree, reached over the wheel, and drew the log to its place. The wheel was then standing still, but as the plaintiff turned to go back to his work, the wheel started up. The man in charge of it was not at the time looking at the plaintiff, but immediately he heard a cry, and turning saw the plaintiff's foot in the wheel. He threw the wheel out of gear instantly, but the plaintiff's limb was found to be so badly crushed as to require amputation above the knee. How the accident occurred is not well explained. The plaintiff appears to have slipped as he turned about, but no one seems to understand why this should have brought his foot into the bull-wheel." * * *

The plaintiff claimed that defendants were negligent in leaving the wheel uncovered, but the Supreme Court in reviewing the case held that the injury was the result of a pure accident, with no more negligence on one side than on the other.

Continuing, the court said: "This case closely resembles *Richards v. Rough*, 53 Mich. 212 (1), which was submitted a few days

1. In *RICHARDS v. ROUGH ET AL.*, 53 Mich. 212 (April Term, 1884), the judgment for plaintiff for \$4,383.33 was reversed. See also *Sjogren v. Hall*, 53 Mich. 275, as being similar to

earlier. In both cases the person injured was a laborer, who had the same means as the employer of understanding the danger. In both cases the injury was the result of such an accident as no one would have been likely to foresee,—its liability to happen was only proved by its actually happening. And in both after the injury had occurred it was easy to show how it might have been avoided. But the very fact that the laborer, who was not wanting in intelligence, or incapable of judging of probable dangers, should continue to expose himself without hesitation, and apparently without fear, to such risks as these were, is very conclusive proof, either that the employer was not culpable in the matter complained of, or that the laborer was inexcusably careless of his own safety. But the truth undoubtedly is that the accident which occurred, so far from having been anticipated by either party, was a surprise to both. The precise accident that occurred in either of these cases might never occur again at all. The next might be something entirely different, and require altogether different precautions. But it might, nevertheless, be seen after it had occurred that it could have been easily guarded against. If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not. But this would work a radical change in the law of negligence in its application to the relation in which these parties stood to each other.” * * *

SWOBODA v. WARD.(1)

Supreme Court, Michigan, April Term, 1879.

[Reported in 40 Mich. 420.]

SAFE MACHINERY AND APPLIANCES.—An employer who introduces improved and complex machinery must take such corresponding precautions to keep his employees from harm in using it as are customary with prudent men.

SAFE PLACE TO WORK.—An employee must furnish a suitable place in which his servant, with due care, may do his work without exposure to dangers that are not usual to his occupation as ordinarily performed.

ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.—An employee assumes the risks of his employment when the machinery used is not defective and the usual means are adopted to guard against acci-

1. The case of *Swoboda v. Ward*, a leading Michigan case on the law 40 Mich. 420 (referred to on page 545 of master and servant, and a much of this volume of *AM. NEG. CAS.*), is cited authority.

dents. But if he voluntarily remains in service in spite of any deficiencies in either respect, and without any promise by the master to correct them, he is without remedy for any injury he may suffer in consequence. The master is guilty of negligence, and the servant of contributory negligence. **EMPLOYEE ONLY BOUND TO KNOW RISKS OF HIS OWN WORK.**

— An employee is not bound, before beginning work, to familiarize himself with the condition of all the machinery he may come in contact with. It is enough if he knows his own work and the risks directly connected with it.

EXTRA HAZARDS—KNOWLEDGE OF DANGER—BURDEN OF PROOF.— If a servant shows that he has been injured in consequence of an unusual risk due to his master's negligence, the master has the burden of showing that the servant knew of the increased danger.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.— When the fact of contributory negligence depends on the credibility of witnesses or upon inferences in which intelligent persons may honestly differ, it is a question for the jury.

SAME—PRESUMPTION.— Contributory negligence presumes a careless act or omission.

SAME—WHAT DETERMINES.— The age, intelligence and experience of one who has suffered from an injury help determine whether he has been guilty of contributory negligence.

EMPLOYEE SLIPPING IN SAW-MILL—FALLING AGAINST COG-WHEELS—CLOTHING CAUGHT IN MACHINERY—CONTRIBUTORY NEGLIGENCE.— A workman employed in a saw-mill to carry slabs from the gang plank, while pulling backwards at one that was too heavy for one man to carry, slipped on some wet bark and fell against certain cog-wheels that caught his pantaloons and injured him. He had not been warned and did not know that the wheels were uncovered. *Held*, that the question whether he was guilty of contributory negligence ought to have been left to the jury (1).

(*Syllabus to official report.*)

ERROR to Mason. Trespass on the case. Verdict directed for defendant. Plaintiff brings error. The case is stated in the opinion. *Judgment reversed.*

1. **HUIZEGA v. CUTLER & SAVIDGE LUMBER Co.**, 51 Mich. 272 (October, 1883), was a case closely resembling *Swoboda v. Ward*, 40 Mich. 420 [the case at bar], and the ruling in the latter case was followed.

In the *HUIZEGA* case, judgment for plaintiff was *affirmed*, the facts being stated by *SHERWOOD, J.*, as follows: "The plaintiff in this case, while in the employ of the defendant, was seriously injured by accidentally coming in contact with some of the

machinery in the defendant's saw-mill, when he was at work under the direction of the head sawyer in the mill. At the time the injury occurred he was, under the direction of the sawyer, removing a slab from some gearing that extended up through the floor two or three feet, and a portion of his pants caught in some cogs that were uncovered, and his leg was drawn thereby between the wheels and severely lacerated. From this injury he underwent great suffering

ISAAC GIBSON, for plaintiff in error.

WHITE & HAIGHT, for defendant in error.

Marston, J.— This was an action brought to recover damages for injuries received while working in the saw-mill of defendant.

and was laid up many months, but finally, after much care bestowed by physicians and nurses, which cost him \$500 or \$600, be recovered, and the injury proved not to be permanent. When the injury occurred the plaintiff was sixteen years old, and had been in the employ of the defendant about twelve days, at a compensation of twelve shillings per day. It further appears that the plaintiff had once before been in the employ of defendant in the same mill, but at different work, and that the mill, after he left it, had undergone many changes and repairs, somewhat changing the machinery therein. It was claimed upon the trial that the plaintiff was not familiar with that portion of the machinery which injured him; that it was the duty of defendants to cover it, and that the same had negligently been allowed by defendants to remain uncovered, exposed, and in a dangerous condition; that he had never noticed or been warned of such danger by defendants, and had no knowledge of the same; and that said machinery might have been covered or boxed, without any detriment or impairment of its usefulness." * * * The points decided are stated in the syllabus to the official report as follows:

"Evidence from competent persons as to the dangerous character of machinery, and the consequences of coming in contact with it, is admissible in an action for injuries caused thereby.

"In an action by a laborer for personal injuries from machinery. testimony as to his consequent liability to

work, the amount of time he lost through sickness, what that time was worth to him, and his reasonable expenses for medical attendance, is admissible as bearing on the amount of damages to which he may be entitled.

"Damages for personal injury include everything of which the person recovering them has been deprived as a direct and natural consequence of the injury.

"A youth employed in a saw-mill was injured by the machinery before he had been there long. He had once before been employed in the same mill. Held, that in an action for the injury he could show the changes made in the arrangement of the mill in the interval between his terms of employment as bearing upon his want of familiarity with them when hurt.

"In an action for a personal injury from mill machinery, the question whether a witness had ever heard of such injuries to other persons is improper as calling for hearsay testimony.

"The age and intelligence of a laborer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury."

See, also, the following case referred to in the *HUIZEGA* case (preceding paragraph), in which the ruling in *Swoboda v. Ward*, 40 Mich. 420, was followed:

In *PARKHURST v. JOHNSON*, 50 Mich. 70 (January Term. 1883), judgment for plaintiff in the Saginaw Circuit Court was *affirmed*, the opinion rendered by Mr. Justice

The evidence on the part of the plaintiff went to show that he had been working in and about the mill some fourteen days; that he was placed near the gang and had to carry slabs from the gang and place them on rollers; that when injured he had taken hold of a heavy slab, too heavy for one man to carry,

Cooley being as follows: "The plaintiff, as administrator of her deceased husband Daniel Parkhurst, brings suit against Johnson for causing the death of her husband by negligence. She recovered judgment in the Circuit Court, and the principal question on this record is, whether there was any evidence of negligence on the part of defendant to go to the jury. The principal facts in the case are these: Johnson, in the fall of 1880, was proprietor of a lime kiln in East Saginaw, which he was then operating. It was customary, when the stone at the base of the kiln was sufficiently burned, to take it out. When this was done the insufficiently burned stone above did not fall into the cleared space but was retained by lateral pressure. To force it down men either stood on the curb at the top of the kiln and pounded upon it with heavy iron bars, or they got upon the stone with their implements and worked upon it until it fell. The fall would be in proportion to the quantity which had been taken out below, and might be one foot, or four or even more. As the stone below would be hot, it would be necessary that the men standing upon the stone when it fell should immediately step off. As the falling would begin from the underside, they commonly had sufficient warning in the sound, and could easily step upon the curbing in time to escape danger. Daniel Parkhurst was a common laborer, and had seen very little of lime-burning. It was not shown that he had any experience which would make him acquainted with its dangers. Johnson hired him, and took him upon the stone with himself and an experienced hand to assist in pounding the stone down. Two draws had been taken out from beneath. This was an unusual quantity, and the probability that the fall would be considerable was increased in proportion. It does not appear that Johnson apprised Parkhurst of this fact, or that he gave him any warning whatever. In going upon the stone Johnson had the danger in mind, and looked to see where he would step off when the fall came, but it does not appear that Parkhurst was anticipating danger or preparing for it. The three men worked at the stone for a time when it suddenly fell to the depth of from four to six feet. Johnson and the experienced workman stepped off, but Parkhurst fell with the stone, and it was impossible to extricate him alive. The circuit judge thought there was some evidence of negligence on the part of Johnson in these facts, and we agree with him. He took an inexperienced man into a place of danger without apprising him of the risk, and without any warning that danger was to be anticipated. It is true the workmen in the business testify that they do not consider it dangerous, and probably it is not when one fully understands it; but this man did not fully understand it and the danger and loss of life came to him in consequence. The negligence consisted mainly in not informing him. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585, 15 Am. Neg. Cas. 506, *ante*; *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467; *Baker v. Allegheny*

and was pulling it, walking backwards; that while so engaged he accidentally stepped on a piece of wet bark and slipped back against the cog-wheels near the slab run; that his pants were caught and his leg drawn into the cog-wheels and severely and permanently injured; that he had not been warned or cautioned about these cog-wheels, and had never noticed them until after he was hurt, but that he could have seen the cogs if he had stopped work to look for them. Evidence was also given to show that these cogs should have been covered in order to be safe; that such wheels are generally covered in mills in order to prevent persons getting injured, and that it is dangerous to run them without being covered. Evidence was also given of plaintiff's lack of experience and knowledge in such mills, and of the nature and extent of the injury received. No evidence was introduced on the part of the defendant.

The court instructed the jury that these cogs being open, uncovered and dangerous, and plaintiff, with a knowledge of such facts, having continued at work, he was thereby guilty of such contributory negligence as would prevent his right to recover, and instructed the jury to return a verdict in favor of the defendant.

It is very evident that the increased dangers to which persons are exposed in the use of machinery at the present day have kept even pace with the progress made in the manufacture of new, improved and complicated varieties thereof, and the employer, therefore, who, in carrying on his business, uses such machinery, must take those precautionary measures which are usual and customary with careful, prudent men to protect his employees from all unnecessary dangers arising from the use thereof.

He is to use that degree of care which every prudent man is expected to employ and does employ under similar circumstances in carrying on the same kind of business. *Cooley on Torts*, 556-557, and cases cited; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 513.

The employer must also provide a suitable place in which the servant, exercising due care, can perform his duty without exposure to dangers that do not ordinarily come within the

Valley R. Co., 95 Pa. St. 211; to present it in detail here. The case *Swoboda v. Ward*, 40 Mich. 420 [the case at bar]. We have given above the result of the evidence upon our minds, and do not deem it important

was fairly submitted to the jury, and the judgment must be affirmed with costs. The other justices concurred."

obvious scope of such employment as usually carried on. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*.

A party entering upon a particular employment assumes the risks and perils usual thereto. Where the machinery used is not defective, either in its construction or from want of proper repair, and where the usual and customary means are adopted to guard against accidents, if wanting in either respect there is an increased risk, and if the servant is injured in consequence thereof, the master must be held responsible therefor.

If, however, the servant, with full knowledge of the facts, and understanding the increased risk occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and remains in the master's employ, then he voluntarily incurs such increased risk, and if he suffers damages in consequence of an injury received thereby, he will be without remedy. The fact that he remains in the master's employ under such circumstances and with such knowledge, is what constitutes contributory negligence on his part.

The master in permitting his machinery to be thus more than ordinarily dangerous is guilty of negligence; the servant with full knowledge thereof, by remaining, contributes thereto. *Cooley on Torts*, 551-552, and cases cited.

A person when employed and instructed to commence work at a particular place, as for instance in this case in a mill, is under no obligation, in order to protect himself from the charge of contributory negligence, to first go all through the building, and make himself familiar with each piece of machinery, and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for him that in entering upon the active discharge of the duties assigned him, he ascertains what he is expected to do, and the dangers directly connected therewith, and he has a right to assume that in the performance of that particular duty reasonable facilities therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers.

Where the servant shows that the injury he received was in consequence of an increased risk, — one not ordinarily incident to the employment, — growing out of the master's negligence, the burthen of proof is upon the master to show that the servant knew of and understood the increased dangers. *Cooley on Torts*, 661 *et seq.*

Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon the credibility of witnesses, or inferences from facts and circumstances about which honest, intelligent and impartial men might differ, such a case should be submitted to the jury. *Conely v. McDonald*, 40 Mich. 150; *Dublin, etc., R. Co. v. Slattery*, 39 L. T. Rep. (N. S.) 265.

Applying these rules to this case, it is clear the court erred in withdrawing it from the consideration of the jury.

The plaintiff at the time of the injury was properly engaged in the active discharge of his duty. He testified that he had not been warned about these cogs, and had not noticed them until after he was hurt. Contributory negligence presupposes the doing of some act which ought not to be done, or the omission to do something which should be done. In other words, a want of due care. 5 Am. Law Reg. (N. S.) 405*n*. If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something which he ought not to have done, and the effort he was making, at the time of the accident, to remove the slab, showed no want of due care on his part, but, on the contrary, was commendable. Even had he known of the cogs and their unguarded condition, it would not thereby conclusively follow that he could not recover. Other facts and circumstances would have to be considered in connection therewith; his age, his intelligence, his experience and such like, so that the jury might ascertain and determine whether he fully understood and appreciated the danger. *Reed v. Northfield*, 13 Pick. 94; *Whittaker v. West Boylston*, 97 Mass. 273; also *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506, *ante*, which in many respects resembled the present case.

I am of opinion that the judgment should be reversed with costs and a new trial ordered. The other justices concurred.

CLARK, ADM'X v. ST. PAUL AND SIOUX CITY RAILROAD COMPANY.(1)

Supreme Court, Minnesota, July, 1881.

[Reported in 28 Minn. 128.]

CONTACT WITH PROJECTING OBJECT — EMPLOYEE INJURED — DUTY OF MASTER TO PROVIDE PROPER APPLIANCES, ETC., FOR USE OF SERVANT — ASSUMPTION OF RISK.—The rule that, in the contract of employment in a dangerous occupation like that of operating a railroad, there is an implied obligation in law, resting on the employer or master, which requires him to use due care in supplying and maintaining the instrumentalities for the performance of the work which he requires of his servants, and renders him liable for injuries occasioned by neglect or omission to fulfil this obligation does not apply to injuries from perils which were known by the servant to exist, and to be incidental to the employment, when he entered upon it. If a servant enters into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. The principle applied to the case of a servant who was injured by coming in contact with a roof or awning projecting from the side of an elevator over a side track, upon which the servant was engaged in moving freight cars.

(Syllabus to official report.)

APPEAL by defendant from an order of the District Court for Scott county, Macdonald, J., presiding, refusing a new trial. The case is stated in the opinion. *Order reversed.*

E. C. PALMER, for appellant.

O'BRIEN & WILSON, for respondent.

Clark, J.—The plaintiff brought this action as the legal representative of James S. Clark, deceased, against the railroad company, defendant, for damages for negligently and in violation of its duty, subjecting her intestate to the peril of being struck by a roof or awning projecting over its side-track, from contact with which he met his death, while engaged in the service of the company. The plaintiff had a verdict, which the defendant claims is erroneous for two principal reasons:—First, the absence of any negligence or omission of duty causing the injury on the part of the defendant; and second, con-

1. The Clark case is referred to in notes on pages 65 and 399 of this volume of AM. NEG. CAS.

tributory negligence, or the voluntary assumption of the risk of the peril, from which the injury happened, on the part of the deceased. The evidence is all before us.

1. In the contract of employment in a dangerous occupation, like that of operating a railroad, there is an implied obligation in law resting on the employer or master which requires him to use due care in supplying and maintaining the instrumentalities for the performance of the work which he requires of his servants, and renders him liable for injuries occasioned by neglect or omission to fulfil this obligation. *Drymala v. Thompson*, 26 Minn. 40.

The verdict for the plaintiff involves a finding by the jury that the defendant violated its obligations or duty to the plaintiff's intestate, by suffering the elevator roof or awning to be constructed and maintained in the position in which it was, with reference to the side-track, upon which it was a part of the duty of the deceased, as a switchman or brakeman, to assist in moving freight cars. The roof or awning was built out from the side of an elevator at Shakopee, on the line of the defendant's railroad, and projected over a side-track, upon which freight cars were accustomed to be moved, in such a position, and with such a downward pitch or inclination, that its lowest projection would strike a man of ordinary height, standing erect upon the center of the roof of an ordinary freight car moving under it, in the head, while it would not come in contact with a man standing eight inches or a foot aside from the center of the car. Its object was to protect grain from the weather while loading from the elevator into the cars, and it projected a little beyond the center of the cars, so as to shed rain upon the roof, and so over them. It had been maintained in this position for eight years or more at the time of the accident. The duties of a brakeman, while engaged in moving cars, require him to pass over them, and a board about fifteen inches in width, called the "running board," is placed along the center of the roof, to facilitate such passage, the roof of the cars being constructed with a slight pitch, and therefore difficult to pass or stand upon when wet or slippery. The plaintiff's intestate was struck by the projecting corner of the awning, while engaged in the line of his duty in moving freight cars upon the side-track. He could only have been struck while standing erect on the running-board. If he had stood down upon the roof of the car, or stooped, he would have escaped. The evi-

dence does not disclose any necessity for the construction and maintenance of the awning in such a dangerous position. Upon this state of facts, the jury would have been abundantly justified, under the rule above mentioned, in reaching a conclusion that the defendant had failed in its implied obligation and duty to the deceased as its servant, and was responsible for the injury, if the deceased had entered upon the service relying upon the obligation or duty of the company to use due care in the construction and location of its road with respect to this structure, and in ignorance that it had failed to do so, and had remained in ignorance of the neglect up to the time of the accident.

2. But the element of knowledge as to the real position of the side-track with reference to the awning, and as to the exact nature and degree of the peril therefrom, by the deceased, when he entered the employment, changed the nature of his employer's obligation to him. The employer had no right to subject him to an unnecessary peril without his consent; but it is well settled in the courts of this country and England that, if a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injury. These views are maintained in the following cases: *Fleming v. St. Paul & Duluth R. Co.*, 27 Minn. 111; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Dillon v. Union Pacific R. Co.*, 3 Dill. 319; *Owen v. N. Y. Cent. R. Co.*, 1 Lans. 108; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183, 14 Am. Neg. Cas. 356*n*; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Baylor v. Del., L. & W. R. Co.*, 40 N. J. L. 23; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Woodley v. Met. Dist. Ry. Co.*, L. R. 2 Ex. Div. 384.

With respect to the knowledge by the deceased of the particular peril from which the accident happened, the following uncontroverted facts appear from the testimony: The deceased was first in the employment of the company from August to November, 1878, as a car repairer and assistant switchman at

Shakopee, and, while so employed, it was his duty and he frequently did assist in moving freight cars upon this elevator track under the awning. He knew the position of the awning was such that if he stood erect upon the running-board on a car passing under it, he would be struck; he had been observed to stoop when passing under it, and he cautioned his fellow-servants against the danger. He entered the service of the defendant again in January, 1879, in precisely the same employment, and continued in it until the accident. Immediately after the accident, he stated that the roof hit him, and knocked him off the car, and, in answer to a question if he did not know the roof was there, he said "Yes; but I did not think of it at the time." It does not appear that anything occurred to distract the attention of the deceased, or that he was interfered with in any respect by others, or that he stood, by the direction of any one, or by the force of any unusual circumstances, where he did when he was struck. The accident, so far as the evidence discloses, was the result of inattention to a known peril on the part of the deceased. Having entered the service with full knowledge of its existence and nature, he must be held to have taken the risk of injury from it on himself, and to have waived any obligation on the part of the defendant, so far as he was concerned, either to remove the peril, or to respond in damages for injuries from it.

The verdict cannot be sustained on the uncontroverted facts appearing from the testimony, and the order denying the defendant's motion is reversed, and a new trial granted.

BERGER (AN INFANT BY HIS GUARDIAN) V. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO.(1)

Supreme Court, Minnesota, July, 1888.

[Reported in 39 Minn. 78.]

MINOR EMPLOYEE INJURED—DANGEROUS MACHINERY.—

Evidence in an action by a servant against a master for an injury sustained in working with machinery, on the ground of the master's negligence in putting the servant to work where he did not know the danger, and in not instructing him in regard to it, considered, and *held* not to sustain a verdict for the plaintiff.

(*Syllabus to official report.*)

1. The Berger case is referred to in a note on page 214 of this volume of AM. NEG. CAS.

APPEAL by defendant from an order of the District Court for Ramsey county, Kelley, J., presiding, refusing a new trial after a verdict of \$5,000 for plaintiff. The case is stated in the opinion. *Order reversed.*

M. D. GROVER, and FLANDRAU, SQUIRES & CUTCHEON, for appellant.

O'BRIEN & O'BRIEN, for respondent.

Gilfillan, Ch. J. — This is an action for a personal injury, occurring, as it is alleged, through the negligence of defendant, while plaintiff, in its employment, was working with a machine called a "roller." He was at work in its boiler-making shop, and was set by the foreman to straighten out pieces of old smoke-stacks, which was done by running them through the machine, in doing which his fingers were caught in the rollers of the machine and crushed. The negligence alleged is: First, in placing plaintiff at work which was too advanced for him; second, in not properly instructing him in such work; and, third, in placing an incompetent person to assist him. The third specification of negligence refers to a fellow-apprentice of plaintiff's named Harrington, who was assigned to plaintiff as a helper in the work of straightening the pieces of smoke-stack. As to Harrington there is no evidence that he was not, so far as any danger to plaintiff was concerned, perfectly competent to do the work he was set to; nor is there a word of evidence suggesting that any act or omission of his caused or in any degree contributed to the injury to plaintiff; so that may be dismissed without further comment.

The first specification of negligence means that plaintiff was set to do work the danger of which his experience and knowledge of the business did not enable him to appreciate, and the second specification, that defendant did not properly instruct him as to such dangers. Plaintiff was an apprentice to learn the trade of boiler-making, and, at the time of the injury, had been so employed by defendant for two years and two months. He was then nineteen years old, and, for aught that appears, was a youth of ordinary capacity. The boiler-making shop was one large room in which plaintiff had worked during the two years and two months. In that room was the machine called the "roller." It appears to have been a powerful machine, of the simplest construction, the operating part consisting of heavy iron rollers, kept in place by the frame in which

their ends were set, and which rollers, when set in motion by the motive power, revolved towards each other. When in motion, a plate of boiler-iron, one end of it being inserted between them, would by their movement be drawn through and crushed flat or smooth, taking out all inequalities in the plate. There was no danger in working the machine unless the hand should get caught and drawn in between the rollers, in which case, of course, it would be crushed. This danger was open to the senses, as apparent as the danger to one who should lie down on a railroad track in front of an approaching locomotive. No one of the commonest capacity could see the machine work and see what it would do, with a plate of boiler-iron, without fully appreciating the danger, and knowing that, if he would avoid injury, he must take care not to get his hands between the rollers. The plaintiff had, as he testifies, seen the machine worked by others almost every day probably, during all the time of his apprenticeship. He had worked it himself every day for a month. Knowledge of the danger was forced on him by his senses. No amount of notice or instruction could have better informed him. The defendant had a right to assume that he knew it. It is apparent that no degree of skill or experience was required to keep the hands away from the rollers. It does not appear that in working the machine there was any need to have the hands so near the rollers that they were likely to get between them. The pieces of smoke-stack which plaintiff was running through the machine were full of rivets, or rivet holes, and the edges were in places turned up, making what are designated spurs or sharp projections. If the pieces were handled with the bare hands, these spurs would cut and scratch them, so it was usual to wear gloves as a protection to the hands. Of course, the spurs would catch the gloves as they would the naked hand. This made it necessary to take care that the glove was not caught by a spur so near the rollers that the hand would be drawn in. No skill nor experience beyond what plaintiff had was needed to know this and to exercise such care. It was not negligence to set him at work, all of the dangers of which he knew as well as any skilled mechanic could know; nor to omit to inform of what his senses had every day informed him. So long as a master is held liable to his servant only for negligence, no case like this can justify a recovery.

Order reversed.

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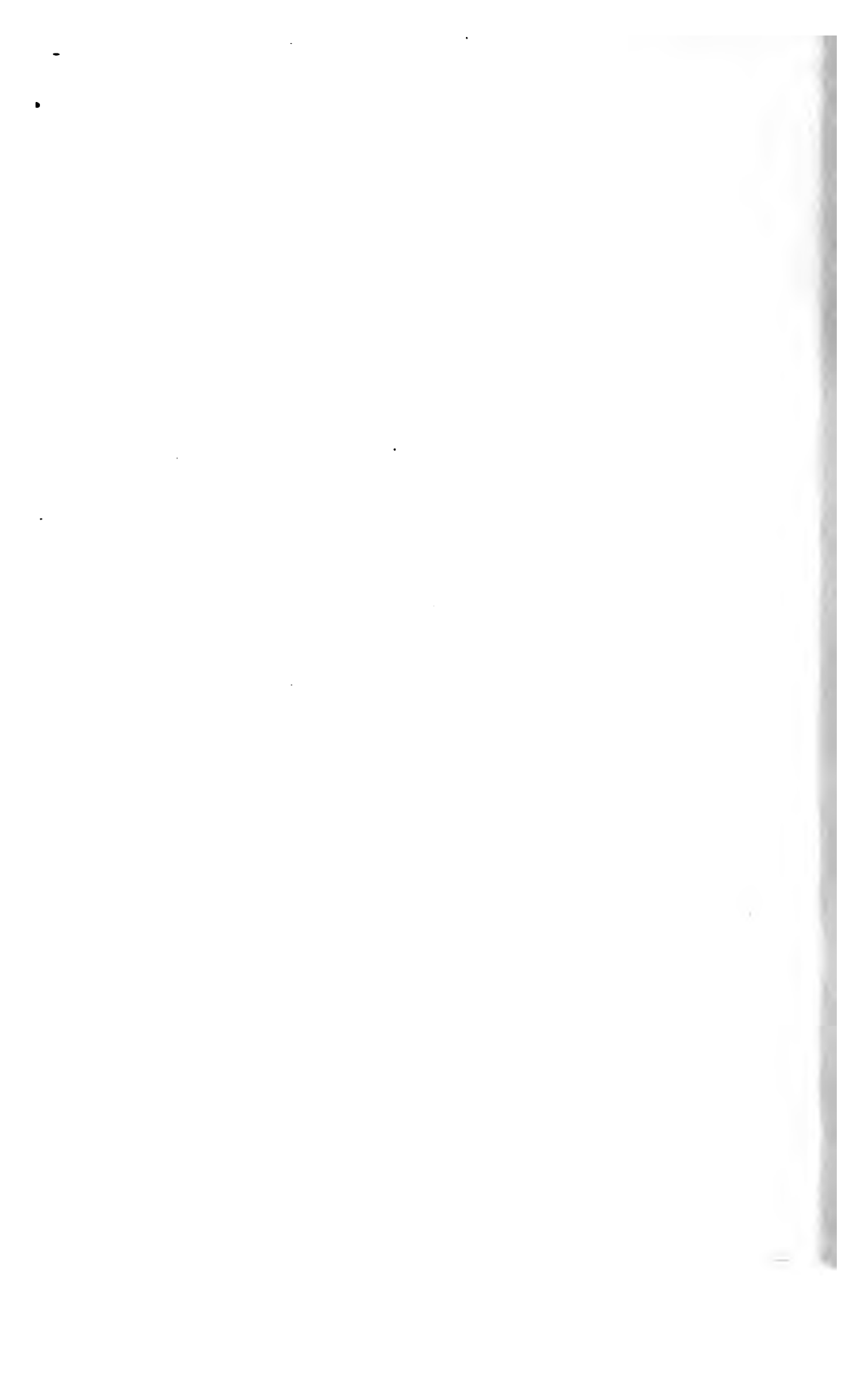
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